IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROGER MILLS,

Petitioner,

vs.

THE HONORABLE WILLIAM MEANS, JUDGE OF THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA,

Respondent,

and

THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Additional Respondent.

79-C-175-C

ORDER

On March 28, 1979, petitioner, represented by counsel, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody".

The Petition submitted by counsel reflects on its face that a Petition for Rehearing is presently pending before the Court of Criminal Appeals for the State of Oklahoma. On the last page of the petition it is stated:

> There is presently a Motion for Rehearing pending in the Court of Criminal Appeals for the State of Oklahoma; however, there is little reason to believe that said Motion will be granted in view of the fact that the Court of Criminal Appeals affirmed the trial court subsequent to the United States Court of Appeals, Tenth Circuit reversal of Gamble v. State of Oklahoma, Okl.Cr., 546 P.2d 1336 (1976).

It is fundamental that a state defendant must exhaust his state remedies before seeking relief from the Federal Courts. The Petition in the instant case is premature.

IT IS, THEREFORE, ORDERED that Petition for Writ of Habeas Corpus be and the same is hereby denied for failure to exhaust state remedies and being premature.

ENTERED this 30th day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WINSTON & STRAWN, LOONEY, NICHOLS, JOHNSON & HAYES, and BRUCE MILLER TOWNSEND,

Plaintiffs,

v.

CECIL D. ANDRUS, Individually and as Secretary of the Interior of the United States, and FORREST GERRARD, Individually and as Assistant Secretary of the Interior,

Defendants.

No. 78-C-423-D

FILED

MAR 30 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has before it for consideration the motion of plaintiff, Winston & Strawn, requesting that it be allowed to dismiss its action without prejudice, pursuant to Fed. R. Civ. P. 41.

The defendants, in their response to the plaintiff's motion, offer no opposition to the motion, basing this lack of opposition, however, on the premise that Winston & Strawn, by requesting dismissal, concedes that whatever claims it may have will be determined by the resolution of this lawsuit. The defendants also state that they "do not wish to be placed in the position of having to deal this this group of Plaintiffs piecemeal, i.e., a separate settlement with Winston & Strawn, in futuro, after having resolved the instant litigation." It is apparent from the defendants' response that they have no objections to the dismissal of the plaintiff's action if such dismissal is with prejudice.

Rule 41(a)(2) provides that except for those situations provided for in Fed. R. Civ. P. 41(a)(1), "an action shall not be dismissed at the plaintiff's insistance save upon order of the court and upon such terms and conditions as the court deems proper." It is well settled that it is within the sound discretion of the Court to impose a broad range of conditions, or none at all, if there be no necessity. 9 Wright & Miller § 2366. This discretion will not be disturbed

upon appeal in the absence of clear abuse. Moore v. C. R. Anthony Co., 198 F.2d 607 (10th Cir. 1952); see also Chase v. Ware, 42 F.R.D. 521 (N.D.Okla. 1967).

In Le Compte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976), the court, in dealing with a motion to dismiss under Rule 41(a)(2), stated:

> When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected. 9 Wright & Miller, Federal Practice & Procedure: Civil, §§ 2362, 2364, at 149, 165 (1971). Nevertheless, in most cases a dismissal should be granted unless the defendant will suffer some legal harm. Holiday Queen Land Corp. v. Baker, 489 F.2d 1031, 1032 (5th Cir. 1974), quoting Durham v. Florida East Coast Ry. Co., 385 F.2d 366 (5th Cir. 1967); recited the law to be applied in this Circuit:
>
> > [We] follow the traditional principle that dismissal should be allowed unless the defendant will suffer some plain prejudice other than the mere prospect of a second lawsuit. It is no bar to dismissal that plaintiff may obtain some tactical advantage thereby. (Emphasis in original).
>
> It seems, therefore, that in ruling on motions for voluntary dismissals, the district court should impose only those conditions which will alleviate the harm caused to the defendant.

528 F.2d at 604-605. The court in Lee-Moore Oil Co. v. Union Oil Co., 441 F.Supp. 730, 740 (M.D.N.C. 1977), citing Le Compte, supra, said:

> When considering a dismissal without prejudice, the Court should keep in mind the interest of the defendant. Nevertheless, in most cases a dismissal should be granted unless the defendant will suffer some legal harm. However, the mere prospect of a second lawsuit is not sufficient to tip the scales in favor of a dismissal with prejudice.

See also American Cyanamid Co. v. McGhee, 317 F.2d 295 (5th Cir. 1963); Germain v. Semco Service Machine Co., 79 F.R.D. 85 (E.D.N.Y. 1978). In Wainwright Securities, Inc. v. Wall Street Transcript Corp., 80 F.R.D. 103 (S.D.N.Y. 1978), the court quoting Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953), said:

> Under Rule 41(a)(2) "[t]he essential question is whether the dismissal of the action will be unduly prejudicial to the

> defendants; if so, plaintiff's motion should be denied. If not, it should be granted upon such terms and conditions as are fair and just."

80 F.R.D. at 105. In determining whether dismissal will be prejudicial to the defendants, it must appear that the defendants, considering the posture of the case at the time dismissal is requested, will suffer substantial prejudice or harm. 5 Moore's Federal Practice ¶ 41.05[1]. The authorities are in agreement that the mere fact that the defendants may suffer a future lawsuit, standing alone, is not so prejudicial as to require denial of the plaintiff's motion to dismiss without prejudice.

The defendants in this case offer as their only reason for requesting that plaintiff be dismissed with prejudice the fear of future litigation. Given the comparatively early stage of the instant litigation, and the fact that due to the presence of other parties plaintiff, the defendants have not suffered the expenditure of wasted time and effort, the Court cannot find that defendants will be prejudiced or harmed if this plaintiff is allowed to dismiss its action without prejudice at this time.

IT IS THEREFORE ORDERED that the action of plaintiff, Winston & Strawn, be and is hereby dismissed without condition or prejudice to future action.

It is so Ordered this 30 day of March, 1979.

Irene Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

H. L. MATHIS and MARY MATHIS, Individually and Jointly d/b/a GREEN VALLEY DAIRY,

Defendants

CIVIL ACTION NO. 76-C-385-B

FILED

MAR 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Consent Order

This cause was commenced by the United States of America to enforce the provisions of Federal Milk Marketing Order No. 106 (7 CFR Part 1106) issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.). Defendants filed an answer denying certain material allegations of the complaint but now defendants agree through their attorney to the entry of the following consent order. Both plaintiff and defendant have reviewed the form of this order and each consents to its entry and to each and every provision thereof.

It is therefore, on this 29 day of March, 1979, by the United States District Court for the Northern District of Oklahoma, ORDERED, ADJUDGED AND DECREED:

1. This Court has jurisdiction of the subject matter hereof and of all persons and parties hereto, and the complaint states a cause of action against the defendants under the Agricultural Marketing Agreement of 1937, as amended (7 U.S.C. 601 et seq.).

2. Plaintiff's motion for summary judgment is hereby granted.

3. A permanent mandatory injunction is hereby issued directing and commanding the defendants, their agents, employees, successors, assigns and all persons in concert or participation with them to comply fully with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and all provisions to Order No. 106, as amended (7 CFR Part 1106), and particularly to make available all records pertaining to defendants' operations and all facilities the

15.

Market Administrator finds are necessary for verification of the information required to be reported by Order No. 106 and/or to ascertain defendants' reporting, monetary or other obligation under Order No. 106.

4. The Court retains jurisdiction of this matter for the purpose of enforcing this Order and entering such further orders and judgments as may be necessary to give full relief herein.

5. That defendants pay the costs incurred in this action which shall be assessed by the Clerk of the Court.

SIGNED AND ENTERED this 26th day of March, 1979.

Reed Dougherty
United States District Judge

Entry Consented To:

R.K. Pezold
By R.K. PEZOLD
Attorney for Defendants

United States of America

Robert P. Santee
By: Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY P. BOSCH, Plaintiff, v. VICTORY LIMESTONE QUARRY, INC., a corporation, Defendant.	)	No. 78-C-264-D

O R D E R

The Court has for consideration defendant's Special Appearance And Motion To Dismiss and has reviewed the file, the briefs and all of the recommendations concerning the motion, and being fully advised in the premises, finds:

That defendant's Special Appearance And Motion To Dismiss should be sustained for the following reasons:

This is an action by an individual resident of the State of Oklahoma against an Ohio corporation for personal injury damages sustained as a result of an automobile-truck accident in Texas.

Jurisdiction is based solely on diversity of citizenship. The Amended Complaint alleges that the plaintiff is a resident of the State of Oklahoma and that the defendant, Victory Limestone Quarry, Inc., is an Ohio corporation with its principal place of business in Lewisburg, Ohio.

The pleadings and affidavits before the Court show that the defendant was not served with a Summons or Complaint in the State of Oklahoma, but was served pursuant to the Oklahoma Long Arm Statutes in a jurisdiction outside of the state.

The defendant is not licensed to do or conduct business in the State of Oklahoma and did not do or conduct business in the State of Oklahoma.

The pleadings and affidavits before the Court show that the plaintiff sustained personal injuries while riding in a

vehicle which collided with a truck driven by an alleged agent of the defendant in the State of Texas.

The defendant asserts that this Court is without jurisdiction of the person of the defendant or the subject matter of this action.

12 O.S. (1971) §187(a) of the Oklahoma Statutes authorizes jurisdiction in Oklahoma over a non-resident defendant when a cause of action arises from "the commission of any act within this state." A newer and parallel section of 12 O.S. (1971) §1701.03 likewise authorizes such jurisdiction over claims based on the non-resident defendant's "causing tortious injury in this state by an action or omission in this state." These provisions require both minimum reasonable contact between a defendant and the State of Oklahoma and that the claim sued upon in Oklahoma derives itself from the purposeful acts of the defendant in Oklahoma. Garrett v. Levitz Furniture Corp., 356 F. Supp. 283, 284 (N.D. Okl. 1973); Crescent Corp. v. Martin, 443 P.2d 111, 117 (Okl. 1968). In a diversity case, a Federal court is limited in its ability to effectuate extra territorial services of process and jurisdiction by the law of the forum state. F.R.C.P. 4(e) and (f); Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., 413 F. Supp. 481 (N.D. Okl. 1976), and Federal Nat. Bank and Trust Co. of Shawnee v. Moon, 412 F. Supp. 644, (W.D. Okla. 1976). where it is stated:

> "In diversity cases, federal district court sitting in Oklahoma looks to Okl. St. Ann. sections 187, 1701.03 in determining whether it has in personam jurisdiction over non-residents."

The Oklahoma Supreme Court in Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okl. 1975) held:

> "To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) §187, the record should show a voluntarily committed act of the defendant by which

> that defendant purposefully availed itself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma."

The statutes referred to above are commonly referred to as the Oklahoma "long arm" statutes (Precision Polymers, Inc. v. Nelson, 512 P.2d 812) (Okla. 1973). A reading of the statutes in question makes it clear that the acts enumerated in said statutes necessary to give the Oklahoma courts jurisdiction over a non-resident are also conditioned on the requirement that the cause of action which is the subject matter of the lawsuit must arise out of the acts which the plaintiff contends give the Court jurisdiction over the non-resident. In Section 187 it is stated:

> "Any person, firm or corporation . . . who does, or who has done any of the acts hereinafter enumerated . . . submits himself . . . to the jurisdiction of the courts of this state as to any cause of action arising, or which shall have arisen, from doing any of said acts." (Emphasis added)

Part (b) of Title 12 Oklahoma Statutes Section 1701.03 states:

> "(b) When jurisdiction is based solely upon this section, the defendant's appearance does not authorize the exercise of personal jurisdiction except as to a cause of action or claim for relief arisin the circumstances enumerated in this section." (Emphasis added)

The Tenth Circuit Court of Appeals construed the Oklahoma long arm statute in George v. Strick Corp., 496 F.2d 10 (10th Cir. 1974). The appellate court held that in personam jurisdiction is authorized "to the outer limits of due process when and only when the asserted cause of action arises from the defendant's activities within the state." George was an Oklahoma resident who sued for personal injury damages as a result of an accident in New Mexico. In denying jurisdiction, the Court reasoned that by adopting the

"arising from" requirement, the Oklahoma Legislature made the decision that Oklahoma courts should not open their door "to every suit which meets the minimum contacts requirements of the due process clause of the federal constitution."

The Court finds that this tort action by an Oklahoma resident against an Ohio corporation occurred in the State of Texas and that under the undisputed facts there is no basis for jurisdiction over this defendant in this forum.

IT IS, THEREFORE, ORDERED that the defendant's Special Appearance And Motion To Dismiss be and is hereby sustained.

Dated this 7th day of March, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STANLEY RICHARD BROWN,

Plaintiff,

-vs-

R. H. SULLIVAN, D.D.S., and FERNANDO ROMERO, M.D.,

Defendants.

No. 78-C-534-B

FILED

MAR 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is a pro se civil rights action brought by Plaintiff under 42 U.S.C. §1983. On February 21, 1979, Defendants filed herein a Motion to Dismiss Plaintiff's action and a supporting Brief. On February 21, 1979, the Court ordered Plaintiff to respond to said Motion on or before March 6, 1979. Plaintiff has neither complied with this Order nor requested an extension.

Inherent in the power of federal courts is the power to control their dockets. Pond v. Braniff Airways, Inc., 453 F.2d 347 (Fifth Cir. 1972); see Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Therefore, in appropriate circumstances, a district court may dismiss a complaint on the Court's own motion. Diaz v. Stathis, 440 F.Supp. 634 (D. Mass. 1977), aff'd, 576 F.2d 9 (First Cir. 1978); see Literature, Inc. v. Quinn, 482 F.2d 372 (First Cir. 1973); see, e.g., Maddox v. Shroyer, 302 F.2d 903 (D.C. Cir. 1962), cert. denied, 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64 (1962).

In the instant case, Plaintiff has failed to comply with the Court's Order of February 21, 1979. Failure to comply with said Order is not a matter that goes to the merits of Plaintiff's Complaint itself and thus does not require dismissal of Plaintiff's action. See Petty v. Manpower, Inc., _____ F.2d _____ (Tenth Cir. 1979). Accordingly, the Court finds and concludes that Plaintiff's Complaint should be dismissed without prejudice for failure to comply with the Court's Order. See Maddox v. Shroyer, supra.

8.

It is so ordered this 29 day of March, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

TULSA DIVISION

FILED

MAR 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DILLARD CRAVENS, et al., Plaintiffs, vs. AMERICAN AIRLINES, et al., Defendants.	CIVIL ACTION NO. 74-C-301 ORDER DISMISSING CLAIMS OF INTERVENOR, VALARIE CREWS

The parties having filed a stipulation to dismiss with prejudice the claims of plaintiff in intervention, Valarie Crews, as to defendant, American Airlines, Inc., and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. All claims of plaintiff in intervention, Valarie Crews, shall be and are hereby dismissed with prejudice as to defendant, American Airlines, Inc.

2. The Court finds there is no just reason for delay and expressly directs that judgment be entered against said plaintiff in intervention in accordance with this Order.

DATED: March 29, 1979.

United States District Judge

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

OVERTON, LYMAN & PRINCE
LAWYERS
550 S. FLOWER STREET
FIFTH FLOOR
LOS ANGELES,
CALIFORNIA 90071
PHONE 683-1100

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED INSULATION COMPANY, an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	74-C-469-C
SPRAYON RESEARCH CORPORATION, a New Jersey corporation, UNITED STATES GYPSUM COMPANY, a foreign corporation, and MONO-THERM INSULATION SYSTEMS, INC., a foreign corporation,	)	
Defendants.	)	

JUDGMENT

Based on the Order filed simultaneously this date,

IT IS ORDERED that Judgment be entered as follows:

1. That judgment be entered in favor of the plaintiff, United Insulation Company, and against the defendant, Sprayon Research Corporation, in the amount of $75,400.26;

2. That judgment be entered in favor of the defendant, Mono-Therm Insulation System, Inc., dismissing it from any liability in the instant litigation.

ENTERED this 28th day of March, 1979.

H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRCIT OF OKLAHOMA

FILED

MAR 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DOUGLAS K. RHINEHART,

Plaintiff,

vs.

JERRY WILSON FALLING,

Defendant.

NO. 79-C-162-C

NOTICE OF

DISMISSAL WITH PREJUDICE

Plaintiff, Douglas K. Rhinehart, and his attorney of record, R. Stephen Haynes, acknowledge full and complete satisfaction of the within cause and hereby dismiss the same with prejudice to any future action.

Dated this 27th day of March, 1979.

BUCK & CRABTREE

By _____
R. Stephen Haynes
1700 Park Harvey Center
Oklahoma City, Oklahoma 73102
(405) 232-2303

Attorneys for Plaintiff

CERTIFICATE OF MAILING

This is to certify that on this 27th day of March, 1979, that a true and correct copy of the foregoing instrument was mailed to The Secretary of State of Oklahoma, 101 State Capitol, Oklahoma City, Oklahoma 73105.

_____
R. Stephen Haynes

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESSE ALEXANDER;
CHARLES ANDERSON;
GENE FULTZ; and
BILL McCAUSE,

Plaintiffs,

-vs-

BANFIELD MEAT COMPANY
OF TULSA, INC.,

Defendant.

No. 79-C-69-C

FILED

MAR 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

OF BILL McCAUSE ONLY

This matter coming on to be heard before me, the undersigned Judge of U.S.District Court, on this 29th dayof March, 1979, the Court finds that, pursuant to Rule 41 (a) of the Rules of Civil Procedure, and upon request of the plaintiff, BILL McCAUSE, and stipulation between plaintiff and defendant as shown by approval of their respective counsel, that said plaintiff should be dismissed from this complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, BILL McCAUSE, only hereby dismisses his complaint against the defendant, without prejudice.

U.S. DISTRICT JUDGE

APPROVED:

ROBERT L. MASON, Attorney for Plaintiff

KOTHE, NICHOLS & WOLFE, INC.

By

GERALD G. STAMPER, Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JAMES M. NELSON and EVANGELENA A. NELSON,	)	
	)	
Bankrupts,	)	
	)	
HARRY MASELLI,	)	
	)	No. 78-C-468-BC
Plaintiff,	)	
	)	
v.	)	
	)	
JAMES M. NELSON,	)	
	)	
Defendant.	)	

O R D E R

The Court has for consideration the appeal from the Judgment of the Bankruptcy Court and has reviewed the file, the briefs and all of the recommendations concerning the appeal, and being fully advised in the premises, finds:

That the judgment of the Bankruptcy Court should be affirmed for the following reasons:

The sole issue on appeal involves the appellant's theory that a non-dischargeable debt exists by operation of Sec. 17A(4) of the Bankruptcy Act as one created by "fraud, embezzelment, mis-appropriation or defalcation while acting as an officer or in any fiduciary capacity". The appellant alleges that money is due to him which the appellee mis-appropriated while holding the same in a fiduciary capacity.

The appellee raises the issue by way of answer that the appellant has taken judgments in the District Court of Tulsa County under the Oklahoma Small Claims Procedure Act (12 Okl. St. P. Ann. Sec. 1751 thru 1771) which judgments establish that the debt is simply one for monies owed.

The Bankruptcy Judge held that the appellant failed to show by admissible evidence the existence of a fiduciary capacity or position of trust that would bring the debt

within the exception of Sec. 17A(4) of the Bankruptcy Act. The Court relied on the decision of the Supreme Court of the United States in Davis v. Aetna Acceptance Company, 293 U.S. 328, 79 L.Ed. 393, 55 S.Ct. 151 (1934) which construed this portion of the act as applying to technical trusts and not those which the law might imply from contract.

The Bankruptcy Judge in his Conclusions of Law made reference to the application of In Re: Nicholas, 510 F.2d 160 (10th Cir. 1975). It was there held that where examination of the complete record made in prior proceedings established without ambiguity or doubt the judgment to be based upon breach of contract and not fraud the creditor could not go behind that record to show by extrinsic evidence that the debt in reality was based on fraud.

The record in this case fully supports the Findings of Fact and Conclusions of Law of the Bankruptcy Court.

IT IS, THEREFORE, ORDERED that the judgment of the Bankruptcy Court be and is hereby affirmed.

Dated this 28th day of March, 1979.

H. Dale Cook
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AWARDS MARKETING CORPORATION, Plaintiff, vs. INTERNATIONAL TOURS, INC., Defendant.	)	Civil Action No. 77-C-474-C

ORDER OF DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant having compromised and settled all issues in the action and having stipulated that the Complaint, Counterclaim and the action may be dismissed with prejudice, it is therefore;

ORDERED, that the Complaint, Counterclaim and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 27th day of March, 1979.

JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHER DISTRICT OF OKLAHOMA

FILED

MAR 28 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DIANNE ELAINE SETCHELL,

Plaintiff,

-vs-

THOM McAN STORE, a division of MELVILLE SHOE CORPORATION, a foreign corporation,

Defendant.

NO. 78-C-474-BE

O R D E R

NOW on this 28th day of March, 1979, this matter comes on before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma upon plaintiff's Application to Dismiss her cause of action. The Court after reviewing the file and premises finds that said application should be sustained and plaintiff's petition herein be dismissed without prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the petition of plaintiff filed herein be dismissed without prejudice.

/s/ H. Dale Cook

UNITED STATES DISTRICT JUDGE

U.S. The N. District

IN THE DISTRICT COURT IN AND FOR ~~TULSA COUNTY, STATE~~ OF OKLAHOMA

O. D. CLEMONS, Plaintiff,	)	79-152-C
vs.	)	NO. ~~CT79-69~~
RIGGS NATIONAL BANK, ET AL., Defendants.	)	

FILED

MAR 27 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Notice of DISMISSAL

COMES now the plaintiff and dismisses his cause of action as against defendant Florida Citrus Mutual only without prejudice towards a future filing herein. This dismissal is filed upon reliance on the affidavit of said defendant filed herein that should it later be discovered that this defendant is a proper party to this action that said defendant will not raise the Statute of Limitation for the period of time between this dismissal and when Florida Citrus Mutual is rejoined in said action by an amended complaint.

Dated this 27th day of February, 1979.

SWANSON and DoREMUS

By: /s/ Gerald D. Swanson
Gerald D. Swanson
711 Thurston Natl. Bldg.
Tulsa, Oklahoma 74103
(918)584-4431

I hereby certify that on the 27th day of March 1979 I mailed a copy of the foregoing to all attorneys with sufficient postage thereon

/s/ Gerald D. Swanson

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE JIMMIE JONES COMPANY, an Oklahoma Corporation,	)	
Plaintiff,	)	79-C-171-C
vs.	)	
MIKE HIGGINS, DONALD R. STOBAUGH, and D & M WELDING SUPPLIES, INC.,	)	
Defendants.	)	

ORDER

This case was removed by the Defendants to this Court on March 23, 1979. In the Petition for Removal the defendants contend that "[I]t appears from plaintiff's petition filed in the State Court that this is a civil action which arises under and is governed by Title 15 USC §1 et seq.". Plaintiff further alleges that while the first cause of action purports to bring an action to enforce "provisions of a purported contract", the second cause of action arises under the Sherman Anti-Trust Act.

The Court has reviewed the allegations of plaintiff's complaint filed in State Court, and it appears that plaintiff's action is solely one in contract.

There can be no removal of a State Court action (which is keyed to original jurisdiction) on the basis of a federal question presented for the first time in defendant's petition for removal. Moore's Federal Practice, Vol. 1A, ¶0.160

In Warner Bros. Records, Inc. v. R. A. Ridges Distrib. Co., 475 F.2d 262 (10th Cir. 1973) the Court said:

> ....It is for the plaintiffs to design their case as one arising under federal law or not, and it is not within the power of the defendants to change the character of plaintiffs' case by inserting allegations in the petition for removal. It is fundamental that the action is not one arising under federal law where the federal question is supplied by way of defense. See Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); State of Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894); Metcalf v. City of Watertown, 128 U.S. 586, 9 S.Ct. 173, 32 L.Ed. 543 (1888). See also Skelly Oil

Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950).

The Court went on to say at page 265:

> ....[a]nd that these cases plainly show that federal jurisdiction not only must appear on the face of the complaint, but further that some indirect relationship to a federal law will not serve to furnish a basis for federal jurisdiction nor is it sufficient that a federal law may emerge in the suit. See Gully v. First National Bank of Meridian, 299 U.S. 109, 115, 57 S.Ct. 96, 81 L.Ed. 70, supra.

SUA SPONTE, IT IS ORDERED that this cause of action and complaint be and the same are hereby remanded to the District Court in and for Tulsa County.

ENTERED this 26th day of March, 1979.

H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRADEN STEEL CORPORATION, an Oklahoma corporation, Plaintiff,	)	
v.	)	No. 79-C-54-~~B~~ C
THE BRADBURY CO., INC., a Kansas corporation, Defendant.	)	

ORDER OF DISMISSAL

NOW on this 26th day of March, 1979, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above styled and numbered cause by plaintiff and defendant. Based upon the representations and requests of the parties, as set forth in the foregoing stipulation, it is

ORDERED that plaintiff's complaint against the defendant The Bradbury Co., Inc., be and the same is hereby dismissed without prejudice.

[illegible] Cook
United States District Judge

APPROVED:

J. Denny Moffett

J. Denny Moffett
CONNER, WINTERS, BALLAINE,
BARRY & McGOWEN
2400 First National Tower
Tulsa, Oklahoma 74103

Attorneys for Plaintiff

Gene L. Mortensen

Gene L. Mortensen
HERSHBERGER, PATTERSON, JONES
& ROTH
700 Farm Credit Banks Building
151 North Main
Wichita, Kansas 67202

ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, Oklahoma 74103

Attorneys for Defendant

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

SAMUEL CLARENCE TAYLOR,

Plaintiff,

vs.

BIG THREE INDUSTRIES-
RANSOME COMPANY DIVISION,

Defendant.

No. 78-C-472-B

ORDER

It appearing to the satisfaction of the Court that all matters and controversies have been compromised by and between the parties, as evidenced by the signatures of their attorneys on the stipulation filed herein on the 23rd day of March, 1979; therefore,

IT IS ORDERED that the Plaintiff's suit be, and the same is hereby, dismissed with prejudice; and

IT IS FURTHER ORDERED that the costs of this Court, in the sum of $15.00 be taxed against the Plaintiff, for which let execution issue, if necessary. No attorney's docket fee will be taxed, the same having been waived by counsel.

Dated this 26th day of March, 1979.

H. Dale Cook
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARBONEX COAL CO.,

Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA, et al.,

Defendants.

No. 78-C-516-C

ORDER

This is an action under Section 303 of the Labor Management Relations Act of 1947, Title 29 U.S.C. § 187, for alleged unfair labor practices in violation of Section 8(b)(4) of that Act, Title 29 U.S.C. § 158(b)(4).

Defendants Galati, Lawley, and Noble have moved this Court to dismiss the action for failure to allege sufficient facts to support a claim upon which relief can be granted, and for lack of jurisdiction pursuant to Section 303 (29 U.S.C. § 187).

Plaintiff's complaint alleges that:

> "[d]efendant Union is now and has been since on or about October 1, 1978, through the action of the individual Defendants, engaged in inducing and encouraging individuals employed by Plaintiff to enter into an agreement which is prohibited by Section 8(e), in violation of Section 8(6)(4)(i)(A) of the National Labor Relations Action [sic], as amended (29 U.S.C. § 158)." Plaintiff's Complaint, filed October 17, 1978, pp 2-3.

Plaintiff thereafter alleges a violation of Section 8(b)(4)(ii)(A), and prayers for damages incurred as a result of the work stoppage allegedly caused by defendants. Pursuant to a motion by defendants, plaintiff filed a More Definite Statement on November 22, 1978, in which it alleged further instances in which actions of defendants violated subsections 8(b)(4)(i)(A) and 8(b)(4)(ii)(A). Plaintiff's complaint is limited to alleged violations of these subsections of the Labor Management Relations Act [29 U.S.C. § 158(b)(4)].

This suit is brought under Section 303, which provides a remedy for damages to business or property caused by unlawful secondary activities.

It does not apply to unlawful primary activities. Price v. United Mine Workers, 336 F.2d 771 (6th Cir. 1964); Powell v. International Brotherhood of Painters & Allied Trades, 429 F.Supp. 1 (W.D.Okla. 1976). Plaintiff's allegations, if taken as true, constitute a primary boycott and nothing more. As such, this action cannot be maintained under Section 303 (29 U.S.C. § 187). This Court is without jurisdiction, and defendants' motion must be sustained.

Furthermore, this jurisdictional defect forces the Court to consider the viability of this action as to the remaining defendants who have not moved for dismissal. City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed 2d 109 (1973). The same reasoning that sustained the above motion to dismiss leads this Court to dismiss as to defendants Tom Pysell and United Mine Workers of America.

For the foregoing reasons, it is hereby Ordered that this action be dismissed for lack of jurisdiction in this Court, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure.

It is so Ordered this 26th day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOMAS J. MUNSON and
CONNIE MUNSON,

Plaintiffs,

v.

BUDDY WEBB and M. C. PRUITT,

Defendants.

No. 77-C-156-C

O R D E R

The Court now has before it defendant's Motion for New Trial, in which he contends that the verdict and judgment should be set aside on the following grounds:

1. That the ends of justice so require;

2. Errors of law occurring at the trial and excepted by the Defendant, particularly in regard to the admissibility of certain evidence and the competency of witnesses to testify as to certain material, and immaterial facts, or suppositions;

3. That the amount of the verdict is contrary to the clear weight of the evidence, both as to actual and punitive damages;

4. Excessive damages appearing to have been granted under the influence of passion and prejudice.

This was an action to enforce liability under 15 U.S.C. § 1989(b) for violations of automobile odometer requirements. Defendant's motion now before the Court does not specify what evidence was inadmissible, which witnesses were incompetent, or which facts were immaterial. Rule 7(b)(1) of the Federal Rules of Civil Procedure requires that:

> "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor...." [Emphasis added].

Defendant's motion clearly falls short of this requirement. See Stinebower v. Scala, 331 F.2d 336 (7th Cir. 1964); Chicago & N.W.R.Co. v. Britten, 301 F.2d 400 (8th Cir. 1962).

In a brief accompanying the motion, defendant makes no further argument as to the substance of his complaint. Instead, he refers the

Court to nine cases in support of four enumerated paragraphs in his motion. Five of the cases are drawn from the Pacific Reporter and necessarily involve state and not federal law. These would therefor be inapplicable to any argument defendant might make (if he had made one) as to procedural issues or issues involving 15 U.S.C. § 1989.

Even if all of defendant's cases cited in this motion were relevant, they carry no weight unless connected to the facts of the instant case. Defendant fails to do this; rather, he merely cites the case, referring neither to the facts of his case nor the case cited.

A perusal of the record reveals none of the defects defendant makes vague allusion to. Defendant's defective motion inhibits consideration of particular issues, except for the amount of the verdict. The jury awarded plaintiffs one-fifth of the amount of actual damages prayed for, and approximately one-sixteenth of punitive damages requested. This amount is consistent with the statutes involved, and is supported by the evidence.

For the foregoing reasons, defendant's motion for a new trial is hereby overruled.

It is so ordered this 23rd day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES WHITEBOOK, NOMINEE, Plaintiff,	)	FILED
v.	)	No. 77-C-391-BC
RON McGINNIS, Defendant.	)	MAR 23 1979 Jack C. Silver, Clerk U. S. DISTRICT COURT

JUDGMENT

In accordance with the Order of the Court filed on March 23rd, 1979, Judgment is hereby entered for the defendant, Ron McGinnis, and against the plaintiff, Charles Whitebook, Nominee, and for the costs of this action.

Dated this 23rd day of March, 1979.

H. Dale Cook
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILLY RAY HARDIN,

Petitioner,

v.

NORMAN B. HESS, et al.,

Respondents.

NO. 78-C-445

ORDER

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Billy Ray Hardin.

Petitioner is a prisoner in the Oklahoma State Penitentiary serving a sentence to a term of 98 years' imprisonment. Sentence was imposed upon conviction by jury of manslaughter in the first degree, the Petitioner having been charged and put to trial for murder in the first degree, in the District Court of Tulsa County, Tulsa, Oklahoma, in Case No. CRF-74-607. A direct appeal was perfected to the Court of Criminal Appeals of the State of Oklahoma and on September 22, 1975, the judgment of the District Court of Tulsa County, Oklahoma, was affirmed. Hardin v. State, Okl. Cr., 540 P.2d 1204 (1975). Petitioner has also filed a previous § 2254 petition in this Federal Court, Case No. 75-C-542, which was denied by Order of June 30, 1976. Thereafter, he filed a post-conviction proceeding in the District Court of Tulsa County which was denied, and on appeal, Case No. PC-78-432, the Oklahoma Court of Criminal Appeals affirmed the denial by order dated and filed August 23, 1978, in which the appeals court stated:

> "There is no reason why petitioner could have not raised these issues in his case on appeal. Therefore, this Court shall not consider them now. 22 O.S.1971, § 1086; Ellington v. Crisp, Okl.Cr., 547 P.2d 391 (1976)."

Petitioner contends and Respondents agree that state remedies have been exhausted.

Petitioner in this second § 2254 petition demands his release from custody and asserts as grounds not previously considered that he is being deprived of his rights guaranteed by the Constitution of the United States of America as follows:

1. He was denied his right to compulsory process to obtain witnesses indispensable to his defense.

2. He was denied due process when the prosecution was permitted to introduce hearsay evidence regarding a telephone conversation.

3. He was denied a fair and impartial trial when Probation Officer Brown was permitted to give opinion evidence.

This cause was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Chief Judge of this United States District Court has reviewed the petition, response, transcript and files of the state proceedings, and being fully advised in the premises, finds that an evidentiary hearing is not required and the petition before the Court is without merit and should be denied and the case dismissed.

In regard to Petitioner's first contention, subpoena was issued on May 6, 1974, commanding the witness, James E. Farbush, to appear in court on May 16, 1974, and the subpoena was not served on the witness because he could not be found. On that date, trial was continued to May 21, 1974. The trial judge properly under state law declined to further continue the trial. Continuance is a matter in the discretion of the trial judge and should not be disturbed in the absence of a clear showing of abuse resulting in manifest injustice. There is no such showing in this case. Counsel is duty bound to produce only those witnesses, if available, who will adequately present themselves to the jury on the issue he presents. Grant v. State of Oklahoma, 382 F.2d 270 (10th Cir. 1967). Petitioner's first contention is clearly without merit.

The testimony of Lozier Brown was regarding a telephone call between the witness and the Petitioner and was not hearsay. The prior criminal record of a witness is admissible in evidence to impeach his truth and veracity. Even should admission of the testimony complained of have been error, the erroneous admission of evidence by the trial court does not afford a basis for collateral attack. Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961); Schechter v. Waters, 199 F.2d 318 (10th Cir. 1952). It is a well established rule that State Court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Gillihan v. Rodriguez, 551 F.2d 1182, 1192-93 (10th Cir. 1977) cert. denied 434 U. S. 845 (1977);

Praxedes v. Cobarrubio v. Ralph Lee Aaron, No. 76-2112 Unreported (filed July 27, 1977). No error is found herein that renders the trial unfair or denying federal constitutional rights, and the second and third contentions of the Petitioner are without merit.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Billy Ray Hardin be and it is hereby denied and the case is dismissed.

Dated this 23rd day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 21 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JIM WALTER HOMES, INC.

Plaintiff

v

No 79-C-12-C

WILFORD CLARK AND
JACKIE A. CLARK

Defendants

APPLICATION FOR DISMISSAL WITH PREJUDICE

Come the parties and make application to the court for dismissal with prejudice for the reason that all issues herein have been fully compromised and settled.

Lawrence A. G. Johnson

Attorney for the Plaintiff

FILED

MAR 22 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA
Hubert Bryant
United States Attorney

Robert P. Santee

ORDER

Now on this 22nd day of March, 1979, upon application of the parties, the above captioned cause is hereby dismissed with prejudice.

H. Dale Cook

Judge of the District Court

LAWRENCE A. G. JOHNSON
ATTORNEY AT LAW
1732 E. 30TH PLACE
TULSA,
OKLAHOMA 74114
(918) 743-3012
743 0459

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KELLY SPENCER WARD,

Petitioner

v.

THE STATE OF OKLAHOMA, et. al.,

Respondents.

No. 78-C-523

ORDER

The Court has for consideration a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by counsel on Petitioner's behalf, seeking a reduction of pretrial bond.

Petitioner at the time of the filing of the petition was held in the Tulsa County Jail on $25,000 bond. He was charged with the crime of pointing a weapon in violation of 21 O.S.A. § 1289.26, Case No. CRF-78-2150. Petitioner filed a petition for writ of habeas corpus in the Court of Criminal Appeals for the State of Oklahoma, Case No. H-78-496, seeking reduction of bond, and the appellate court denied the writ without prejudice to Petitioner's seeking further relief at the conclusion of his preliminary hearing. At preliminary hearing, Petitioner's motion to reduce bond was overruled and he was bound over to the District Court. An application to reduce bond was then filed in the District Court of Tulsa County, and upon evidentiary hearing the District Judge declined to reduce bond. A second petition for writ of habeas corpus was filed with the Oklahoma Court of Criminal Appeals, Case No. H-78-559, on which no action had been taken at the time of the filing of the petition before this Federal Court.

This cause was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Chief Judge of this United States District Court has reviewed the petition, response, transcripts of the hearings on the motions to reduce bond in the State Court, and addendum to response, and being fully advised in the premises, finds that an evidentiary hearing is not required and the petition before this Court should be denied and the case dismissed.

Petitioner made the $25,000 bond complained of and was released from confinement in jail. Upon application of the bondsman to withdraw the bond, on November 1, 1978, the bond was recalled and bench warrant

for Petitioner's arrest issued. He was taken into custody which resulted in an additional charge being filed against him alleging carrying a firearm in a drinking establishment under 21 O.S.A. § 1272.1 and a $10,000 bond was set on the second charge. See, Sanford v. Middlebrooks, 254 F.Supp. 914 (D.C.La. 1966), where it was held that habeas corpus was without merit where petitioner had been released on bail until bonding company revoked bond and petitioner was remanded to jail because he was unable to obtain another bond. Hearings were held in the District Court of Tulsa County on February 5, 1979, and Petitioner's bond in CRF-78-2150 was reduced from $25,000 to $10,000, and in CRF-78-2863 from $10,000 to $2,000. Petitioner has posted the reduced bonds and is again released from jail.

The only relief sought from this Federal Court is reduction of the $25,000 pretrial bond in Case No. CRF-78-2150. The relief sought has been obtained in the District Court of Tulsa County, State of Oklahoma, and the cause pending herein is moot. Further, this Court finds that the bond complained of herein was not wholly beyond a range within which judgments could rationally differ, and that the bond was not discriminatory so as to violate Petitioner's right to equal protection or arbitrarily set so as to constitute a violation of due process. See, United States ex rel. England v. Anderson, 347 F.Supp. 115 (D.C.Del. 1972); Turco v. State of Maryland, 324 F.Supp. 61 (D.C.Md. 1971) affirmed 444 F.2d 56 (4th Cir. 1971); Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964) cert. denied 376 U. S. 965 (1964).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Kelly Spencer Ward be and it is hereby denied and the case is dismissed.

Dated this 21st day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH W. DAVIS, JR.,

Plaintiff,

vs.

ERNEST ERDMANN, Port Director, (Port of Tulsa, Oklahoma) BUREAU OF CUSTOMS, DEPARTMENT OF THE TREASURY, and REX B. DAVIS, Director, Bureau of Alcohol, Tobacco and FIREARMS, Department of the Treasury,

Defendants.

75-C-356-C

JUDGMENT

Based on the Order filed simultaneously with this Judgment this date,

IT IS ORDERED that Judgment be entered in favor of the defendants and against the plaintiff.

ENTERED this 20 day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE EMPIRE DISTRICT ELECTRIC COMPANY, a Public Utility Corporation,

Plaintiff,

vs.

A PERPETUAL EASEMENT FOR AN ELECTRICAL SUBSTATION TO BE LOCATED UPON A CERTAIN TRACT OF LAND IN OTTAWA COUNTY, OKLAHOMA;

and

THE UNITED STATES OF AMERICA, AS A MATTER AFFECTING THE TITLE TO CERTAIN QUAPAW INDIAN LANDS PREVIOUSLY ALLOTTED IN FEE WITH CERTAIN RESTRAINTS ON ALIENATION AND PRESENTLY OWNED BY A RESTRICTED QUAPAW INDIAN, AND AS TRUSTEE FOR THE QUAPAW TRIBE OF INDIANS;

and

ODESTINE HAMPTON McWATERS, and OMER V. LINN,

Defendants.

No. 78-C-336-B

FINAL DECREE AUTHORIZING TAKING AND CONDEMNATION

Now on this the 20th day of March, 1979, this cause comes on for hearing regularly to be heard. Plaintiff appearing by its attorney, Dennis J. Watson of Wallace and Owens, Inc., and the defendants, The United States of America, Trustee, for the Quapaw Tribe of Indians, and Odestine Hampton McWaters, appearing by their attorney, Hubert A. Marlow, Assistant United States Attorney for the Northern District of the State of Oklahoma, and the defendant, Omer V. Linn, appearing not, but made default.

All parties announced ready for hearing, the Court's attention was drawn to each and every one of the following pleadings heretofore filed in this proceeding, to-wit:

The Complaint, Amended Complaint, Application for Order Directing Manner of Service, verified under oath; Order of this Court dated July 25, 1978, directing manner of service of Notice; Notice by Clerk of the Court to the Area Director, Muskogee Area Office, Bureau of Indian Affairs, U. S. Department

of Interior, Muskogee, Oklahoma, Odestine Hampton McWaters and to Omer V. Linn; Notice to the Attorney General of the United States and the United States Attorney for the Northern District of Oklahoma, by attorneys for plaintiff; Affidavit of Mailing and Service of Notice executed under oath by Dennis J. Watson, attorney and agent for plaintiff; Answer of the Defendants, United States of America and Odestine Hampton McWaters; Order Appointing Commissioners; Oath of Commissioners; Report of Commissioners; Certificate of Court Clerk as to the deposit of amount of Commissioners award and payment of all costs including fees of Commissioners; Notice by Court Clerk of filing of Report of Commissioners; Motion of Defendants, The United States of America and Odestine Hampton McWaters; Order dated January 8, 1979, setting the matter for hearing on the issue of ownership of the property sought to be condemned, and allocation and distribution of the Order of Compensation and Appointing Special Master; Notice by Court Clerk of hearing; Report of Special Master; Notice by Court Clerk of filing of Report of Special Master; Order Adopting Report of Special Master and Directing Distribution of Award; Demands for Jury Trial by Defendants and Plaintiff; Amendment to Amended Complaint; Notice of filing of Amendment to Amended Complaint; Motion of Plaintiff; Order Amending Pleadings; and Stipulation as to Just Compensation filed on the 16th day of March, 1979.

WHEREUPON the plaintiff by and through its attorney, in open Court, withdrew its demand for jury trial and the defendants, The United States of America, Trustee for the Quapaw Tribe of Indians, and Odestine Hampton McWaters, by and through their attorney, in open Court withdrew their demand for jury trial and agreed to abide by said Stipulation as to Just Compensation on file herein, whereby it is stipulated by all parties that judgment may be entered herein based upon said Complaint and Amendments thereto and said Stipulation,

relative to the damages suffered by the parties and interest in and to the lands herein sought to be condemned and which will result from appropriation by plaintiff of a perpetual easement for an electrical substation, all as hereinafter more particularly set out, and the Court having examined said Stipulation, the Report of Commissioners, and all other matters filed herein, and thus being fully advised in the premises;

THE COURT FINDS: That the matter set out in the verified Complaint and Amendments thereto herein filed by plaintiff are true and correct and said plaintiff, a corporation organized under the laws of the State of Kansas, duly licensed, qualified and authorized to transact and carry on the business of an electric utility company within Ottawa County, Oklahoma, and by virtue of the public nature of said business, is therefore endowed with the right of eminent domain in the appropriation and use of properties and interest therein necessary to or required by its proper purposes, and it further appearing that the taking and use of a perpetual easement for said purposes is a taking and use for a public purpose and that said plaintiff should be granted the relief prayed for in its said Complaint and Amendments thereto; and that this Court has proper jurisdiction of this cause by reason of the Act of Congress of March 3, 1901, Chap. 832 § 3, 31 Stat. 1084, 25 U.S.C. Sec. 357; and that Notice of this proceeding has been served according to law and the Order of this Court upon all parties and interest in and to the land involved herein; including the United States of America which is an interested party by reason of the fact that this matter affects the title to certain Quapaw Indian Lands previously allotted in fee with certain restraints on alienation which are still in effect with respect to said land and presently owned by a restricted Quapaw Indian; that all necessary parties to this cause are now properly before the Court for final disposition of this proceeding; that plaintiff has withdrawn its demand for jury trial; that the

defendants, The United States of America and Odestine Hampton McWaters have withdrawn or waived their right to jury trial; that the defendant, Omer V. Linn, has been duly served according to law and Order of this Court with Notice of this proceeding and has failed to answer or otherwise plead herein, and is in default; that the plaintiff and the defendants, The United States of America and Odestine Hampton McWaters, have joined in praying that final disposition be made of this proceeding and agree and stipulate that the said Stipulation on file herein fairly and fully awards compensation for the perpetual easement sought to be condemned by plaintiff herein; that by said taking and use of said perpetual easement, plaintiff obtains no ownership of the oil, gas or minerals (if any) underlying the subject lands.

THE COURT FURTHER FINDS: That the description of the lands upon which plaintiff seeks herein to condemn said perpetual easement to construct, operate and maintain an electrical substation is as follows:

> Commencing at the intersection of the South line of Section 36, Township 29 North, Range 22 East, Ottawa County, State of Oklahoma, and the East right-of-way line of the St. Louis and San Francisco Railway, thence North 27° 54' 30" East along said East railway right-of-way line a distance of 28 feet to the point of beginning, which point of beginning is on the North right-of-way line of a public road, thence North 27° 54' 30" East along said East railway right-of-way line a distance of 283 feet, thence in an easterly direction a distance of 108 feet, thence in a southerly direction a distance of 250 feet to the said North right-of-way line of the public road, thence in a westerly direction a distance of 240 feet to the point of beginning, containing one (1) acres, more or less.

THE COURT FURTHER FINDS: That the defendant, Odestine Hampton McWaters, is the owner of the above described real property.

THE COURT FURTHER FINDS: That the defendant, Omer V. Linn, does not own any interest in the above described real property condemned in this action.

THE COURT FURTHER FINDS: That the reasonable and adequate damages as found by the Commissioners occurring to said lands as a result of said appropriation of said perpetual

easement is in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

THE COURT FURTHER FINDS: That the nature of the property and the rights with respect to said lands so to be taken and the uses for which such property is to be taken are: as follows:

A perpetual easement on the above described real property, to erect, operate and maintain an electrical substation for the purpose of transformation of electrical power from a 69 Kv transmission voltage to a suitable distribution voltage, the perpetual right, privilege, and authority to erect, operate and maintain said electrical substation on the above described real property; the perpetual right to enter upon said lands for the purpose of erecting, constructing, reconstructing, operating and maintaining, repairing, and removing, the said electrical substation on the said real property; the right to install drive access, fence and grade the said real property and install the necessary foundations, structures and equipment normally associated in the construction, maintenance and operation of an electrical substation; and the perpetual right to enter upon said real property for the purpose of making repairs or rebuilding or reconstructing or removing the said electrical substation.

The Court further finds that pursuant to the Report of Commissioners, plaintiff has heretofore paid into the depository of this Court the sum of Three Thousand Five Hundred Dollars ($3,500.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the entry upon and taking forthwith of said rights in perpetual easement as found and described above herein, upon, over and across said lands as hereinbefore set out, by plaintiff, for erecting, constructing, reconstructing, operating, maintaining, repairing and removing the said electrical substation, all as prayed for in said Complaint and amendments thereto, is hereby authorized and confirmed in all things and said plaintiff, The Empire District Electric Company, is hereby

vested with said perpetual easement and rights, together with perpetual right of ingress and egress, all free and clear of any and all claims of defendants herein who are hereby perpetually enjoined and barred from hereafter claiming adversely to plaintiff's said rights, privileges and estate ordered, adjudged, decreed and granted herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Stipulation as to Just Compensation executed by the parties herein and filed herein on March 16, 1979, is hereby approved and the sum therein agreed upon in the amount of $4,000.00 is adopted as the award of just compensation and damages for the estate condemned herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff shall forthwith pay into the Registry of this Court the additional sum of $500.00 as damages, being the deficiency between the amount heretofore deposited and the total award of just compensation and damages for the estate condemned and when such deficiency is deposited into the Registry of this Court, the Clerk of this Court shall thereafter disburse the sum of $500.00 to the Bureau of Indian Affairs, Miami Agency, Miami, Oklahoma, to be distributed by the Bureau as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the perpetual easement and rights taken by plaintiff and described herein, and the operation of said electrical substation does not convey any ownership of the oil, gas or minerals (if any) underlying the subject lands, and further that the damages awarded herein shall not be construed as concluding the rights of any defendant, to the extent of their interest therein, if entitled to claim, to sue for and recover damages, if any, that may occur, in the future, occasioned by the maintenance of said electrical substation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of Commissioners' fees shown in the Receipt of Commissioners herein is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the cost of this proceeding be taxed against the plaintiff and the case be and hereby is closed.

W. Dale Cook
Judge of the District Court

APPROVED FOR PLAINTIFF

Dennis J. Watson
Dennis J. Watson
Its Attorney

APPROVED FOR DEFENDANTS,
The United States of America
and Odestine Hampton McWaters

Hubert A. Marlow
Hubert A. Marlow
Assistant United States Attorney
for the Nothern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KARRIEM ABD ABDULLAH, a/k/a
JAMES E. JENNINGS,

Petitioner,

v.

NORMAN B. HESS, et. al.,

Respondents.

NO. 78-C-225-C

FILED

MAR 20 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has for consideration a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis by Petitioner. Petitioner is confined at the Oklahoma State Penitentiary, McAlester, Oklahoma, by virtue of a Judgment and Sentence rendered March 18, 1976, in the District Court of Tulsa County, Tulsa, Oklahoma, Case No. CRF-75-2854. Therein, Petitioner was convicted by jury of robbery by fear and sentenced to a term of imprisonment for 50 years.

Petitioner filed a direct appeal, Case No. F-76-720, and the Oklahoma Court of Criminal Appeals affirmed the Judgment and Sentence, reported, Jennings v. State, Okl. Cr., 561 P.2d 986 (1977). Petitioner also filed a Petition for Writ of Habeas Corpus in the Oklahoma Court of Criminal Appeals, Case No. H-76-865, which was transferred to the direct appeal because the habeas corpus issues were the same as the issues in the appeal, and the habeas corpus was dismissed by Order dated and filed December 21, 1976. Further, Petitioner filed an application for writ of mandamus in the Oklahoma Court of Criminal Appeals, Case No. 0-77-877, and his request for a copy of the transcript of the trial proceeding was denied by order dated and filed January 5, 1978. State remedies have been exhausted as to the contentions presented to this Court.

Petitioner contends that his rights guaranteed by the Constitution of the United States were violated in the State conviction and demands his release from custody based on the following grounds:

1. He, as an indigent, has been denied a free transcript of the proceedings against him which is a denial of equal protection of the law.

2. Improper and prejudicial remarks were made by the prosecutor at voir dire, on direct and cross-examination of witnesses, and during closing argument.

3. An essential element of the crime, asportation, was not proved.

This cause was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Chief Judge of this United States District Court has reviewed the petition, response, transcript and files of the state proceedings, and being fully advised in the premises, finds that an evidentiary hearing is not required and the petition before the Court is without merit and should be denied and the case dismissed.

Petitioner's first contention is without merit. There is no denial of equal protection of the law by not providing a copy of the transcript for a defendant's personal possession. Jones v. Crisp, No. 78-1268, Unpublished (10th Cir. filed Nov. 14, 1978). Also see, Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970); Jackson v. Turner, 442 F.2d 1303 (10th Cir. 1971); Sides v. Tinsley, 333 F.2d 1002, 1003 (10th Cir. 1964).

Petitioner's second claim complains of prejudicial remarks by the prosecutor during voir dire, direct and cross-examination of witnesses, and closing argument. This contention is also without merit. Petitioner makes no claim or showing that no blacks were available from the panel of jurors in his case or that blacks are systematically excluded from jury service in the District Court of Tulsa County. There is no transcript of the voir dire examination before this Court in Petitioner's case. However, under Oklahoma law a trial or proceeding may proceed without the necessity of a court reporter being present unless there is objection by a party or counsel. See, in regard to closing argument not being recorded, Byrd v. State, Okl. Cr., 530 P.2d 1364 (1975); Linebarger v. State of Oklahoma, 275 F.Supp. 79 (N.D. Okl. 1967) affirmed 404 F.2d 1092 (1968) cert. denied 394 U. S. 938 (1969). Further, Petitioner was permitted to actively participate at voir dire in the selection of the jurors for his trial. His counsel stated in part, of record at page No. 186 of the transcript:

> "I would like the record to reflect during the voir dire portion to the jury, that of those jurors that were excused was the choice of Mr. Jennings, although generally I did confirm with most of his choices."

From this Court's review of the trial testimony, no direct or cross-examination by the prosecutors is found that would render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. It is a well established rule that state court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding, unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Gillihan v. Rodriguez, 551 F.2d 1182, 1192-93 (10th Cir. 1977) cert. denied 434 U. S. 845 (1977); Praxedes v. Cobarrubie v. Ralph Lee Aaron, No. 76-2112 Unreported (filed July 27, 1977). Further, nothing was said in the closing argument by the prosecutors that would amount to a violation of Petitioner's due process rights. Improper remarks by the prosecutor do not form the basis for overturning the conviction of a state prisoner in a habeas corpus proceeding where the remarks do not result in the deprivation of a fundamentally fair trial. Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966) cert. denied 385 U. S. 905 (1966); Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

The third contention presented by the Petitioner is frivolous. A thorough review of the record establishes that Petitioner's conviction rests upon evidence presented at trial from which the jury could find the Petitioner guilty beyond a reasonable doubt of the elements, including "asportation" of the crime of robbery by fear in violation of 21 O.S.A. § 791 as charged. Alleged insufficiency of evidence is not reviewable by habeas corpus in federal courts. Sufficiency of the evidence to support a state conviction raises no federal constitutional question. Capes v. State of Oklahoma, 412 F.Supp. 1111 (W.D.Okl. 1975). The sufficiency of the evidence to sustain a conviction is not subject to review in federal habeas corpus as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Karriem Abd Abdullah, a/k/a James E. Jennings, be and it is hereby denied and the case is dismissed.

Dated this 19th day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH W. DAVIS, JR.,

Plaintiff,

vs.

ERNST ERDMANN, Port Director, (Port of Tulsa, Oklahoma) BUREAU OF CUSTOMS, DEPARTMENT OF THE TREASURY, and REX B. DAVIS, Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury,

Defendants.

75-C-356-C ✓

ORDER

This matter was tried to the United States Magistrate in a non-jury trial, pursuant to the agreement of all parties. The Magistrate has filed his Findings and Recommendations and Objections have been filed by the defendants. The Court has carefully reviewed the entire file, including the trial transcript, the exhibits and all briefs and the litigation is now ready for disposition.

This litigation was commenced by the plaintiff for judicial review of agency action by the defendant, Rex D. Davis, Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury (hereinafter referred to as "Director"), in denying an application and reapplication by plaintiff for appropriate papers allowing the importation of a knife-pistol, which plaintiff alleges may be lawfully imported; seeking judicial review of agency action by the defendant Director in denying the plaintiff's request that the knife-pistol be removed from the provisions of the National Firearms Act pursuant to the authority vested in the Secretary of the Treasury, pursuant to the provisions of 26 U.S.C. §5845(a); and seeking judicial review of the decision of the Director that a proposed alteration by the plaintiff to the knife-pistol would not take the knife-pistol outside of the

definition of the term "any other weapon" as defined in 26 U.S.C. §5845(e).

The Magistrate recommended, after a non-jury trial, that judgment be entered in favor of the plaintiff. The defendants object to the Findings and Recommendations of the Magistrate, and specifically Findings of Fact numbered 9, 10, 16, 18, 19, 20, 26, 27, 28, 29, 30, 31, 32 and 34; and conclusions of law numbered 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13. The Court will, therefore, consider the objections raised and adopt and affirm those Findings of Fact and Conclusions of Law not objected to.

The plaintiff in the instant litigation was for a period of approximatley 9 years, and is, a collector of antique, unusual and odd firearms and at all times pertinent to this litigation had all the requisite licenses required as a collector of firearms, including Federal firearms license number 73-5985.

After receiving various catalogs listing unusual and odd firearms for sale to collectors, plaintiff noticed in one of said catalogs, prior to October 18, 1973, an advertisement offering for bid auction one item described as a "rare knife-pistol" manufuactured by the U.S. Small Arms Company. The offering was made by Wallis & Wallis, an English specialist firm dealing in antique arms and armor. Plaintiff submitted a bid for said item, and said bid was successful and the item was shipped to plaintiff at Tulsa, Oklahoma, from England.

The "knife-pistol" was received by Customs officials at Tulsa, Oklahoma, together with documents originating in England. On the Wallis & Wallis invoice, the item is listed as follows: "A rare pistol knife; U.S. Small Arms Co., manufactured in the U.S.A. 1870. The certificate that accompanied the knife-pistol (Pl. Ex. 19-A) reveals the following:

> It is hereby certified that the gun or other small arm, details of which are set out below, was duly presented for examination at the Proof House of the Worshipful Company of Gunmakers, and was not proved for the followin reason:---
>
> (1) The arm is a collectors or museum piece which is not intended to be fired.
>
> (2) The arm is of a gauge or calibre for which cartridges

are no longer available.

Type Knife Pistol Gauge and Chamber Length .22"
Barrel Length 1-1/4"

Maker America Serial Number None

Other Distinguishing Marks None

The Certificate also contained this notation:

> Warning:---This arm, to which this certificate should be attached, has not been proved and must be deemed unsafe to fire, and must not be offered for sale as serviceable.

Plaintiff, upon being advised that the "knife-pistol" had been received by the Customs Officials, submitted by mail, on October 18, 1973, the proper forms to issue the necesary conditional permit. These forms were submitted to the Director, Rex B. Davis (who has now been replaced as of July 1, 1973, by John G. Krogman, Acting Director).

On November 26, 1973, a letter was sent to plaintiff (Pl. Ex. 2) denying authorization to import the "knife-pistol". The letter stated:

> This is in response to your letter dated October 18, 1973, transmitting an application seeking authorization to import a .22 caliber knife pistol manufactured by the U.S. Small Arms Company of Chicago, Illinois.
>
> Since this particular disguised gun variation has not been exempted from the provisions of the National Firearms Act (26 U.S.C. Chapter 53), we are unable to authorize its importation into the United States. Section 925(d)(3) of Title I of the Gun Control Act of 1968 specifically prohibits the importation of any firearm falling within the definition of a "firearm" as that term is defined in Section 5845(a) of Title II of the cited Act. The U.S. Small Arms Company knife pistol falls into the classification of "any other weapon" as defined in Section 5845(a) since it is a device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive.
>
> While the belt buckle pistol you previously imported had formerly been classified as "any other weapon" it was authorized for importation as a deactivated curio or museum piece firearm after removal from classification under the National Firearms Act.
>
> Your disapproved Form 6 application is enclosed along with other documents that accompanied it.

By letter dated December 7, 1973, plaintiff requested the Director's designee to classify the "knife-pistol" as a "Collector's item not likely to be used as a weapon" and again offered to make the "knife-pistol" unserviceable by making it incapable of discharge and incapable of being readily restored

to a firing condition. (Pl. Ex. 4).

By letter dated January 29, 1974, the Director's designee refused to issue a permit (Pl. Ex. 6) stating:

> This is in reply to your letter of December 7, 1973, in which you asked why you were not permitted to import a .22 caliber knife pistol manufactured by the U.S. Small Arms Company.
>
> Section 925(d), Chapter 44, Title 18, United States Code, which became effective October 22, 1968, contains the provisions governing the importation of firearms into the United States. Importation of a type of weapon that falls within the definition of a firearm as defined in Section 5845(a), Chapter 53, Title 26, United States Code, is specifically prohibited. Section 5844 of that Chapter provides that a firearm as defined in Section 5845(a) may only be imported:
>
> (1) for use of the United States or any department, independent establishment, or agency thereof or any State or possession or any political subdivision thereof; or
>
> (2) for scientific or research purposes; or
>
> (3) solely for testing or use as a model by a registered manufacturer or solely for use as a sample by a registered importer or registered dealer.
>
> Firearms intended for scientific or research purposes may be imported only by firms or businesses which actually conduct firearms research. All such firms or businesses are required to be properly licensed under existing Federal, State and local laws in order for them to receive such weapons.
>
> Recently, research was conducted by members of our technical staff, on the possibility of reclassifying the U.S. Small Arms, .22 caliber knife pistol. However, because this particular knife pistol lacks any positive means of identification, such as a trade name or serial number, and because it fires readily available ammunition, it is impossible to reclassify this item.
>
> You mention the Nazi belt buckle pistol which you conditionally imported. That particular importation was allowed since the Nazi belt buckle pistol had been exempted from the amended National Firearms Act due to its extreme scarcity and the unlikelihood of its being used as a weapon.
>
> We possess information that knife pistols of the type you wish to import were commercially available as late as 1952. We also have documented cases where they were used as weapons. Based on these facts we felt that the removal of this weapon from the "any other weapon" category would not be in keeping with the intent of the Congress of the United States in enacting the Gun Control Act of 1968....

The evidence adduced that the statement contained in the above quoted letter that the "knife-pistol" lacked a "trade name" is erroneous in that the knife-pistol has stamped upon it "U.S. Small Arms Co., Chicago, Ill." (Pl. Ex. 19)

In a letter dated March 4, 1976 (P. Ex. 27), Mr. James A. Hunt, Acting Assistant To the Director, made the following

statements in response to a letter dated February 16, 1976, from plaintiff's counsel:

> 1. The Bureau of Alcohol, Tobacco and Firearms has not adopted any statements of policy or interpretations relating to the specific classification of knife-pistols. However, it has been held that knife-pistols fall squarely into the "any other weapon" category of the Gun Control Act of 1968 and Part 179 of Title 26 C.F.R., subsection 179.11, page 2 (ATF P 5300.4, 8/74)....
>
> 2. We have no staff manuals or specific instructions to staff which would affect a determination or classification of a knife-pistol when importation is sought.
>
> 3. The statement in Mr. Darr's letter of January 1, 1974, "knife-pistols of the type you wish to import were commercially available as late as 1952" is an error; it probably should have read "1923".
>
> 4. We have no documented knowledge of a knife-pistol used as a weapon. We can not say now that such documented information did not exist in ATF in January, 1974, but we do say that we can not locate such information now.
>
> 5. We have no documents showing that the knife-pistol was patented in October 1917. NOTE: The information was gained through research, and during conversations with Mr. Craddock Goins, at the Smithsonian Institution, Washington, D.C.
>
> 6. ....
>
> 7. We have no documents showing that, "compared to the Peavey, the item manufactured by U.S. Small Arms Company was manufactured in great numbers and enjoyed considerable sales for a number of years." (See note after item 5 above.)
>
> 8. We have no documents showing the numbers by year of manufacture for each year the Peavey knife-pistol was manufactured.
>
> 9. We have no documents showing the numbers by year of manufacture for each year the U.S. Small Arms Company knife-pistols were manufactured.
>
> 10. We have no documents showing the total number by year of manufacture of Colt commemorative pistols.
>
> ....

After further correspondence, during which the Director's designee advised that the ATF was "not at liberty to divulge information concerning the past availability of the knife-pistol by commercial outlets or the documented cases where this type weapon was used in the commission of crime", plaintiff, by letter of April 29, 1974, requested a review of the current classification of the "knife-pistol" in question. Plaintiff included with the submission, among other things, certificates by the Curator of the J. M. Davis Gun Museum, owned by the State of Oklahoma, that

the "knife-pistol" was "rare", received its monetary value due to its "rarity", and was definitely "a curio which has museum interest"; a statement from the Curator of the Winchester Arms Museum at New Haven, Conn., that an example of the "knife-pistol" in question was displayed there; a statement of the Curator of the Texas Memorial Museum, Austin, Texas, that the museum had in its collection such a "knife-pistol"; statements from other authorities that the "knife-pistol" in question is of novel design, had a "very short and limited period of manufacture" and attesting "its rarity and low incidence in which it ever appears on the collector's market for sale"; letter from an official of the Police Department of the City of New York that "a search of our records indicated that we have never experienced the type of weapon, described in your brochure, as being used in the commission of a crime in the City of New York", and evidence that the U.S. Small Arms Company was in existence only for the year 1917. (Pl. Ex. 10).

Plaintiff's Exhibit 21 is a picture of a Peavey "knife-pistol". This is a .22 caliber short rim fire weapon and is on the list of approved weapons and is exempted from the act. In response to plaintiff's assertion concerning the Peavey "knife-pistol" the ATF had responded by letter of June 23, 1974:

> The A. J. Peavy(sic), .22 short rimfire caliber knife pistol, which you mention as having been removed from the purview of the Act, are all identified by serial number. Further, the manufacture of the Peavy(sic) terminated long before the 1898 date cited for classifying antiques.

In response to a letter of April 29, 1974, from plaintiff asking for a review of the current classification of the "knife-pistol" the Director's designee responded, in pertinent part (Pl. Ex. 12):

> ....
>
> Section 178.11, Part 178, Title 26, Code of Federal Regulations defines curios and relics. However, curios and relics are not removed from the purview of statutory or regulatory control. The status merely allows the interstate transfer of such items between licensed collectors. All other controls and fees, if applicable, still apply.
>
> In the history of the National Firearms Act, which was enacted in 1934, the class of firearm known as "any other weapon", which includes knife pistols, has been enlarged in scope to more definitively include disguised firearms.

....

> The knife pistol, manufactured by the U.S. Small Arms Company, was patented in Ocrober 1917 and manufactured for a number of years. It was advertised in the March 1922 issue of Popular Science Monthly and the 1923, N. Shure Company catalogue. Some of these devices were marked "Huntsman" on the blade, and the word "Patented" appeared on the top of the cartridge chamber, while others bear no markings whatsoever and some bear only the word "Patented" on the chamber, thereby making it impossible to identify those knife pistols originally manufactured by U.S. Small Arms Company. The fact remains, that compared to the Peavy(sic), the item manufactured by U.S. Small Arms was manufactured in great numbers and enjoyed considerable sales for a number of years.
>
> The National Firearms Act of 1934 caused the disappearance from the scene of these and other contemporary knife pistols, bringing about the seemingly scarce supply of this type of firearm on todays legal market.
>
> Because of the great number of these U.S. Small Arms Company knife pistols that were manufactured and the obvious intent of Congress to place stringent controls on such commodities over the years since 1934, we find it impossible to reclassify the U.S. Small Arms Company knife pistol at this time.

On October 14, 1974, plaintiff resubmitted his request, enclosing additional items purporting to evidence that the U.S. Small Arms Company was in business no earlier than 1916 and no later than 1917, and that an example of the U.S. Small Arms "knife-pistol" was among those in the collection of the Smithsonian Institution. (Pl. Ex. 15 and 16).

Thereafter, by letter of December 19, 1974, the Director's designee stated:

> We do not dispute your contention that the knife pistol currently is rarely, if ever, used as a weapon. However, it is our considered opinion that the knife pistol would be likely to be used as a weapon if it were removed from the registration requirement and other requirements of the National Firearms Act.
>
> In addition, we do not consider this firearm to be primarily a collector's item by reason of the "date of manufacture, value, design and other characteristics." It is a firearm which can easily be duplicated and counterfeited. Such a weapon would be inexpensive to manufacture. Those manufacutured by the U.S. Small Arms Company could not be readily distinguished from others which we believe would be widley circulated if the U.S. Arms knife pistol were removed from the controls of the National Firearms Act. It would be difficult to prosecute the owner of an unregistered identical firearm, if this firearm were not required to be registered.

The Director's designee went on to state:

> Since the device is a "firearm" under the National Firearms Act and does not meet the sporting test criteria for importation, we must deny your request for a finding that the U.S. Arms knife pistol may be imported pursuant to 18 U.S.C. §925(d)(3).
>
> You also believe the importation of this firearm should be allowed under the provisions of 18 U.S.C. §925(d)(2). In arguing that the knife pistol is a "curio or museum piece," you place emphasis on the term "curios or relics." The latter term appears in the definition of "collector" at 18 U.S.C. §921(a)(13), and has reference to firearms which a licensed collector may ship or receive in interstate or foreign commerce. The fact that a firearm is classified as a "curio or relic" would not entitle it to classification as a "curio or museum piece" as that term is used in 18 U.S.C. §925(d)(2). You will note that the regulations do not separately define "curios" and "relics," but contain a single definition of the term "curios and relics". 26 C.F.R. §178.11.
>
> The regulations do not define the term "curio or museum piece." Of course, we do not reach the question of whether a firearm is a "curio or museum piece" except in the case of an "unserviceable firearm." An "unserviceable firearm" must not only be incapable of discharging a shot by means of an explosive, but also must be incapable of being readily restored to a firing condition. 26 U.S.C. §5845(h). Generally, an accepted method for rendering a firearm unserviceable is by welding the barrel solidly to the frame and having the chamber of the firearm steel-welded shut. A firearm with minor parts missing is inoperable but is still considered to be serviceable. ....We also point out that an unserviceable firearm is still subject to the controls of the National Firearms Act, but may be transferred tax free as a curio or ornament pursuant to 26 U.S.C. §5852.
>
> We find it unnecessary to determine whether the U.S. Arms knife pistol, if made unserviceable as described above, would meet the criteria of 18 U.S.C. §925(d)(2). Such a determination would be appropriate if it were not a "firearm" as defined in 26 U.S.C. §5845. However, the knife pistol is a firearm as defined in that section. Therefore, it must meet the importation criteria set forth in 26 U.S.C. §5844. It obviously does not meet this criteria. Therefore, a finding that it does, or does not,meet the requirements of 18 U.S.C. §925(d)(2) would be meaningless.

The application was once again denied.

It was after this denial that the plaintiff instituted the present litigation.

On March 21, 1977, plaintiff submitted new forms requesting the granting of a conditional permit, proposing to make the knife-pistol inoperative by taking the following action:

> (1) Flatten the end of the firing pin in an approved manner so as to make the firing pin inoperative,
>
> (2) Plug the barrel with silver solder or some other permenent means.

On April 25, 1977, the Director responded (Pl. Ex. 28) in pertinent part as follows:

> Your request was considered by the Bureau's Firearms Classificiation Panel. This panel determined that the proposed alteration would not remove the knife-pistol from the definition of "any other weapon" as such an altered knife-pistol could be readily restored to a firing condition as a result of its design. In particular, our firearms experts determined that the silver solder could be easily removed from the barrel and the firing pin replaced or fixed in a short interval of time.
>
> I have reviewed the panel's determination and concur with the panel's conclusion that the proposed alterations would not remove the knife-pistol from the definition of "any other weapon" as contained in 26 U.S.C. §5845(e). We are, therefore, denying your request to conditionally import this National Firearms Act firearm.

Plaintiff then filed his Amended Complaint, adding a Second Cause of Action, seeking a conditional permit for the importation of the litigated item.

At the trial, Mr. Robert J. Scroggie, a witness for defendant, testified commencing at page 88:

> Q Now, the petitioner's attorney has brought up the possibility of altering the knife pistol by, I guess, putting epoxy into the barrel.
>
> A Yes, sir.
>
> Q In your expert opinion, could the knife pistol be restored after epoxy was put into the barrel?
>
> A Yes, sir,

and at page 89:

> Q How long would it take, in your expert opinion, to remove epoxy from a barrel of a knife pistol such as this?
>
> A Not more than 30 minutes.

The Court has jurisdiction of this action and of the defendants (5 U.S.C. §702).

The review of the Court of an agency decision is limited. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) the Court said:

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 707(a)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jaffe, supra, at 182. See McBee v. Bomar, 296 F.2d 235, 237 (CA6 1961); In re Josephson, 218 F.2d 174, 182 (CA1 1954); Western

Addition Community Organization v. Weaver, 294 F.Supp. 433 (ND Cal. 1968). See also Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.

Title 18 U.S.C. §921(a)(3) provides:

The term "firearm" means (A) any weapon....which will or is designed to or may readily be converted to expel a projectile by the action of any explosive;....

Title 18 U.S.C. §922(l) provides:

Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

Title 18 U.S.C. §925(d) provides:

The Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes to the satisfaction of the Secretary that the firearm or ammunition----

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition....

Title 26 U.S.C. §5845(a) provides:

For the purposes of this chapter---

The term "firearm" means....

(5) any other weapon, as defined in subsection (e);....

The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Title 26 U.S.C. §5845(e) provides:

> The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, ... and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or revolver having a rifled bore,....

Title 26 U.S.C. §5844 provides:

> No firearm shall be inported or brought into the United States or any territory under its control or jurisdiction unless the importer establishes, under regulations as may be prescribed by the Secretary or his delegate, that the firearm to be imported or brought in is----
>
> (1) being imported or brought in for the use of the United States or any department, independent establishment, or agency thereof or any State or possession or any political subdivision thereof; or
>
> (2) being imported or brought in for scientific or research purposes; or
>
> (3) being imported or brought in solely for testing or use as a model by a registered manufacturer or solely for use as a sample by a registered importer or registered dealer;....

The applicable regulations are 27 C.F.R. §178.113(a) which provides:

> ....[T]herefore, no firearm or ammunition shall be imported or brought into the United States or a possession thereof by any licensee other than a licensed importer unless the Director issues a permit authorizing the importation of the firearm or ammunition.

27 C.F.R. §178.113(b) provides:

> An application for a permit, Form 6 (Firearms), to import or bring a firearm or ammunition into the United States or a possession thereof by a licensee, other than a licensed importer, shall be filed, in triplicate, with the Director [Bureau of Alcohol, Tobacco and Firearms].... If the Director approves the application, such approved application shall serve as the permit to import the firearm or ammunition described therein. The Director shall furnish the approved application to the applicant and retain two copies thereof for administrative use. If the Director disapproves the application, the applicant shall be notified on the basis for the disapproval.

27 C.F.R. §178.113(c) provides:

> A firearm or ammunition imported or brought into the United States or a possession thereof under the provisions of this section may be released from Customs custody to the licensee importing the firearm or ammunition upon his showing that he has obtained a permit from the Director for importation.

27 C.F.R. §179.111(a) provides:

> No firearm shall be imported or brought into the United States ....unless the person importing or bringing in the firearm

establishes to the satisfaction of the Director that the firearm to be imported or brought in is being imported or brought in for: (1) The use of the United States or any department, independent establishment, or agency thereof; or (2) Scientific or research purposes; or (3) Testing or use as a model by a registered manufacturer or solely for use as a sample by a registered importer or registered dealer. The burden of proof is affirmatively on any person importing or bringing the firearm into the United States....to show that the firearm is being imported or brought in under one of the above subparagraphs. Any person desiring to import or bring a firearm into the United States under this paragraph shall file with the Director an application on Form 6 (Firearms) .... The person seeking to import or bring in the firearm will be notified of the approval or disapproval of his application....Customs officers will not permit release of a firearm from Customs custody except for exportation, unless covered by an application which has been approved by the Director and which is currently effective....

27 C.F.R. §179.111(b) provides:

Part 178 of this chapter also contains requirements and procedures for the importation of firearms into the United States. A firearm may not be imported into the United States under this part unless these requirements and procedures are also complied with by the person importing the firearm.

27 C.F.R. §179.25 provides:

The Director shall determine in accordance with section 5845(a), I.R.C., whether a firearm or device, which although originally designed as a weapon, is by reason of the date of its manufacture, value, design, and other characteristics primarily a collector's item and is not likely to be used as a weapon.....

In Darin v. Armstrong v. U.S. Environmental Protection, 431 F.Supp. 456, 461, 462 (USDC ND Ohio ED 1976) the Court said:

The central issue before this court is whether the decision of the EPA has a rational basis. See, e.g., Sabin v. Butz, 515 F.2d 1061, 1067 (10th Cir., 1975); American Trucking Associations, Inc. v. FCC, 126 U.S.App.D.C. 236, 377 F.2d 121, 134 (1966), cert.denied, 386 U.S. 943, 87 S.Ct. 973, 17 L.Ed.2d 874. This court is not permitted to substitute its judgment for that of an administrative agency's in an appeal if the agency's decision is based upon conclusions which are reasonably reached after due consideration of all relevant issues. See, Law Motor Freight, Inc. v. C.A.B., 364 F.2d 139, 144 (1st Cir. 1966). But the deference that this court must show to the conclusions which an administrative agency draws does not lessen this court's duty to thoroughly inquire into the factual basis supporting an agency's conclusions in order to insure that the conclusions reached are rational, reasonable and just in light of evidence presented in the record.

In John V. Carr & Son, Inc. v. United States, 347 F.Supp. 1390, 1396 (U.S. Customs Ct., 3rd Div. 1972) it was said:

General principles of administrative law teach that the courts have been ever loath to disturb the administrative acts and rulings of responsible officials who possess a special knowledge and competence in particular areas of government. This judicial reluctance is manifest in a

> very large number of cases that need not be cited. More recently, the Supreme Court has declared that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman et al., 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).
>
> Accordingly, the courts have stated that "due regard must be given to the integrity of the administrative function. Given a range of reasonable alternatives, the administrator is given the task of selecting the one which, in his judgment, is most appropriate. In such circumstances, the courts must defer to his judgment. (case citations omitted) Thus it is settled that on the legal question of statutory interpretation, the experienced judgment of the public agency or commission charged with the responsibility of administering the statute will be given great weight. (case citations omitted)
>
> Clearly, in a case where the statute is reasonably susceptible of the interpretation adopted by the agency, the court will sustain that construction, even though the court might have reached a different conclusion had the issue initially arisen judicially. (case citations omitted)

The United States District Court for the Eastern District of Michigan entertained litigation commenced by the plaintiff for an order allowing importation of one firearm and an order requiring the Bureau of Alcohol, Tobacco and Firearms to enter 96 fireams in question in the central registry. Plaintiff, who was currently a resident of Canada, sought to import 96 firearms into the United States. Eighty-nine of these firearms were exported by the plaintiff from the United States in 1973 when plaintiff established residency in Canada. Prior to their exportation, these firearms were listed in the central registry of the National Firearms Act firearms. When they were exported they were removed from the registry because they were no longer in the United States. Plaintiff decided to re-establish residency in the United States. The Bureau found that plaintiff did not meet the requirements of Title 26 U.S.C. §5844, a necessary prerequisite for the importation of National Firearms Act firearms. The Court concluded that the "actions of the Bureau in denying importation of the firearms in question was reasonable and in compliance with the law. Brennan v. United States, 435 F.Supp. 451 (USDC ED Mich. SD 1977).

The Court finds that the knife-pistol in question is a National Firearms Act firearm as defined in 26 U.S.C. §5845. As such, the

importation requirements for National Firearms Act firearms found in 26 U.S.C. §5844 are separate and distinct from the importation requirements found in Chapter 44, Title 18, United States Code. To be imported, a National Firearms Act firearm must first meet the imporation provisions of the National Firearms Act, Chapter 53, Title 26, United States Code, and implementing regulations in Part 179, Title 27, Code of Federal Regulations, before it can be considered for importation under the importation provisions in Chapter 44, Title 18, United States Code. Brennan v. United States, supra.

Since the knife-pistol is a National Firearms Act firearm, it does not qualify for importation under the provisions of 26 U.S.C. §5844 and the denial of the application for imporation was proper.

The decision of the Director, Bureau of Alcohol, Tobacco and Firearms, that the knife-pistol was not primarily a collector's item and could likely be used as a weapon and thus did not qualify for removal under 26 U.S.C. §5845(a) was not arbitrary and capricious. The evidence in the record reveals that such decision was based upon the advice of the firearms experts of the Bureau of Alcohol, Tobacco and Firearms, as well as upon the information available to the Director concerning similar types of weapons. The decision is not so unreasonable or unlawful that such decision was malicious or made in bad faith.

Additionally, the Court finds that the determination of the Director, ATF, that the proposed alteration by the insertion of silver solder in the barrel and the flattening of the firing pin would not remove the firearm from the classification of "any other weapon" as defined in 26 U.S.C. §5845(e) was not arbitrary. The evidence reveals that such decision was based upon the evaulation and recommendation of the Firearms Classification Panel consisting of firearms experts employed by the ATF and attorneys of the Chief Counsel's office of the ATF who found that

such altered firearm could be readily restored to firing condition.

The determinations made by the Director, ATF, with relation to the knife-pistol here involved were not arbitrary, capricious; that the responsible officials possess special knowledge and competence in the particular area here concerned, and that there is substantial evidence to support the determination of the Director.

The Court, therefore, finds that the determinations of the Director should be sustained; that the objections to the Findings and Recommendations of the Magistrate should be sustained; and that Judgment should be entered in accordance with this order in favor of the defendants and against the plaintiff.

IT IS SO ORDERED.

ENTERED this 20 day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH EUGENE SUTTON,

Petitioner,

v.

NORMAN B. HESS, et. al.,

Respondents.

NO. 78-C-458

ORDER

The Court has for consideration a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Kenneth Eugene Sutton.

Petitioner is serving a ten-year sentence at the Oklahoma State Penitentiary, McAlester, Oklahoma, upon conviction by jury of knowingly concealing stolen property after former conviction of a felony in Case No. CRF-75-1606 in the District Court of Tulsa County, State of Oklahoma.

Petitioner demands his release from custody and as the sole ground therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America in that he was not given a full and fair hearing on his Fourth Amendment claim as required by Stone v. Powell, 428 U. S. 465 (1976), and therefor, his conviction is based on the receipt of evidence that should have been suppressed.

Petitioner asserts, and Respondents concur, that State remedies have been exhausted on the contention presented to this Court in that the issue of the validity of the search in question has been presented in each of the following proceedings: A direct appeal of the conviction perfected to the Oklahoma Court of Criminal Appeals, Case No. F-76-383, wherein the conviction was affirmed. Sutton v. State, Okl. Cr., 558 P.2d 1193 (1977). A petition for writ of certiorari filed with the Supreme Court of the United States, Case No. 76-6849, in which certiorari was denied, 434 U. S. 846 (1977). Thereafter, Petitioner filed an application for post-conviction relief in the District Court of Tulsa County, Case No. CRF-75-1606, which was denied. An appeal therefrom was perfected to the Oklahoma Court of Criminal Appeals, Case No. PC-78-454, and that Court, by Order dated and filed August 24, 1978, affirmed the District Court denial.

This cause was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Chief Judge of this United States District Court has reviewed the petition, response, transcript and files of the state proceedings, and being fully advised in the premises, finds that an evidentiary hearing is not required and the petition before the Court is without merit and should be denied and the case dismissed.

Petitioner admits that prior to jury trial there was an evidentiary hearing on his motion to suppress, but he contends that the hearing was not full and fair. The Court, fully cognizant that where a search is patently unlawful without consent, and consent is obtained under color of the badge, courts will indulge every reasonable presumption against the waiver of a fundamental constitutional right, Rogers v. United States, 369 F.2d 944 (10th Cir. 1966), Cert. denied, Ferguson, et. al., v. United States, 388 U. S. 922 (1967), has carefully reviewed the state files and transcripts and finds that the state court hearing was fair and adequate. The trial court fully considered Petitioner's contention that the evidence discovered from the search of the trunk of his car was poisonous fruit in that his prior arrest and a search inside his car were illegal. The evidence from that first arrest and search was suppressed by the trial court. The later search of the trunk of his car, while under the prior unlawful arrest, which produced the weapons upon which his present conviction and sentence rests was found by the trial court to be a search pursuant to his uncoerced, voluntary consent. The state courts have considered Petitioner's contention in regard to constitutional standards under Wong Sun v. United States, 371 U. S. 471 (1963); Nardone v. United States, 308 U. S. 338 (1939); and Schneckloth v. Bustamonte, 412 U. S. 218 (1973). A two-day evidentiary hearing on Petitioner's motion to supress evidence was held in which five witnesses were called and Petitioner himself testified. The decision that the search in question was a consent search is supported by substantial evidence and is not clearly erroneous. Therefore, decision herein is controlled by the holding of Stone v. Powell, 428 U. S. 465, 494 (1976) that:

> "...where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."

IT IS, THEREFORE, ORDERED that the Petition for writ of habeas corpus of Kenneth Eugene Sutton be and it is hereby denied and the case is dismissed.

Dated this 20th day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LEWIS AARON BOWEN,

Petitioner,

v.

MACK H. ALFORD, Warden, et al.,

Respondents.

NO. 78-C-393

ORDER

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Lewis Aaron Bowen.

Petitioner is a prisoner at the Vocational Training Center, Stringtown, Oklahoma, serving a sentence of 15 years' imprisonment. Sentence was imposed upon conviction by jury of robbery with firearm after former conviction of a felony in the District Court of Tulsa County, State of Oklahoma, Case No. CRF-77-2815.

The cause before this Court was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Judge has reviewed the petition, motion to dismiss of the Respondents, Petitioner's traverse and motion for speedy disposition, and being fully advised in the premises, finds that the petition should be denied without prejudice and the case dismissed.

Petitioner, represented by counsel from the Tulsa County Public Defender's Office, has pending a direct appeal from his conviction before the Oklahoma Court of Criminal Appeals. The period from conviction on February 9, 1978, and sentence on February 16, 1978, to submission of the appeal for decision, Case No. F-78-465, on March 6, 1979, was caused by Petitioner's pro se petitions and by requests of his appointed counsel. Therefore, this Court finds no undue delay requiring immediate action herein prior to ruling by the state appellate court. See, Lee v. State of Kansas 346 F.2d 48 (10th Cir. 1965). There is no principle in the realm of federal habeas corpus better settled than that that state remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert.

denied 410 U. S. 944 (1973). It is well recognized that a collateral attack will not be entertained during the pendency of a direct appeal. Welsh v. United States, 404 F.2d 333 (5th Cir. 1968); Masters v. Eide, 353 F.2d 517 (8th Cir. 1965); Black v. United States, 269 F.2d 38 (9th Cir. 1959) cert. denied 361 U. S. 938 (1960). Also see, Gordon v. Crouse, 357 F.2d 174 (10th Cir. 1966); Denney v. State of Kansas, 436 F.2d 587 (10th Cir. 1971). The petition to this Court is premature until direct appeal in the state court system is decided. Miller v. State of Oklahoma, 363 F.2d 843 (10th Cir. 1966); Kessinger v. Page, 369 F.2d 799 (10th Cir. 1966). Although the probability of success is not the standard to determine whether a matter should first be determined by the state courts, Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971), it is proper to recognize that the habeas corpus petition to this Court may well become moot and unnecessary upon decision by the state appellate court. Edwards v. State of Okl., 436 F.Supp. 480 (W.D. Okl. 1977).

IT IS, THEREFORE, ORDERED that the motion of the Petitioner for speedy disposition is overruled, the motion of the Respondent to dismiss is sustained, and the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Lewis Aaron Bowen be and it is hereby denied without prejudice for failure to exhaust adequate and available state remedies and the case is dismissed.

Dated this 20th date of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

OKLAHOMA TERRITORY RESTAURANT,

Defendant.

CIVIL ACTION NO. 78-C-533-C

ORDER DISMISSING CAUSE WITHOUT PREJUDICE

This matter coming on to be heard at this time upon the Plaintiff's Motion to Dismiss this cause Without Prejudice, and good cause appearing therefor,

NOW, THEREFORE, IT IS ORDERED that the above cause be, and it hereby is, dismissed without prejudice.

/s/ H. Dale Cook
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

BARBARA JEAN ESTES, individually, SHELLEY DAWN ESTES, a minor, who sues by and through her mother and next friend, BARBARA JEAN ESTES, TERRY DEWAYNE ESTES, a minor who sues by and through his mother and next friend, BARBARA JEAN ESTES; and BARBARA JEAN ESTES, Administratrix of the Estate of ROBERT ALONZO ESTES, JR., Deceased,

Plaintiffs,

vs.

No. 76-C-415-B

AMERICAN LA FRANCE, INC., a corporation, otherwise known as American-LaFrance Foamite Corporation, a corporation, otherwise known as "Automatic Sprinkler Corporation of America, a corporation; and STERLING PRECISION CORPORATION, a corporation,

Defendants.

ORDER OF DISMISSAL OF DEFENDANTS' CROSS-COMPLAINTS

On this 19th day of March, 1979, upon the written application and stipulation of the defendants for a dismissal with prejudice of the cross-complaint that each of said defendants has filed against the other for indemnity, the Court having examined said application and stipulation, finds that the said defendants, American LaFrance, Inc., a corporation, (A-T-O, Inc.) and Sterling Precision Corporation, have entered into a compromise settlement of all claims involved herein, and the Court being fully advised in the premises finds that the cross-complaint of each defendant against the other for indemnity should be dismissed with prejudice.

IT IS THEREFORE ORDERED by the Court that the cross-complaint of each defendant against the other for indemnity be and the same is hereby dismissed with prejudice to any further action.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CERTAIN-TEED PRODUCTS CORPORATION,	)	FILED
Plaintiff,	)	MAR 16 1979
vs.	)	Jack C. Silver, Clerk U. S. DISTRICT COURT
CHARLES E. WILSON, d/b/a Wilson Lumber Company,	)	
Defendant.	)	No. 79-C-146-D

NOTICE OF DISMISSAL

Plaintiff, Certain-Teed Products Corporation, dismisses the above styled and numbered case without prejudice.

BLACKSTOCK JOYCE POLLARD
BLACKSTOCK & MONTGOMERY

By /S/
William C. Kellough
300 Petroleum Club Bldg.
Tulsa, OK 74119
(918) 585-2751

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I certify that on March 15, 1979, I caused a true and correct copy of the foregoing Notice of Dismissal to be mailed to Mr. Charles E. Wilson, Wilson Lumber Company, 5519 E. Tecumseh, Tulsa, OK 74115, with sufficient postage prepaid thereon.

/S/
WILLIAM C. KELLOUGH

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 16 1979

GEOSOURCE INC., a Corporation,	)	
vs.	)	
TESORO PETROLEUM CORPORATION, a Corporation;	)	
WHEATLEY COMPANY, a Corporation;	)	No. 79-C-17-B
TOUCHE ROSS & CO., a Co-partnership;	)	
COLLINS L. CARTER; PETER M. DETWILER; JAMES K. ELLIS; THOMAS C. FROST, JR.; L. ROBERT FULLEM; JAMES C. PHELPS; ARTHUR SPITZER; CHARLES WOHLSTETTER; DR. ROBERT V. WEST, JR.	)	
Defendants.	)	

DISMISSAL WITHOUT PREJUDICE

Comes now the plaintiff GEOSOURCE INC. through its attorney Richard J. Dent and dismisses its Petition filed herein, without prejudice.

GEOSOURCE INC.

By: _____

Richard J. Dent
5549 South Lewis Ave.
Tulsa, Oklahoma 74105

Attorney for Plaintiff

Dated this 16th day of March, 1979.

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of March, 1979 I mailed a true and correct copy of the foregoing Dismissal Without Prejudice to Floyd L. Walker, Esq., Walker, Jackman and Adamson, Inc., 1919 Fourth National Building, Tulsa, Oklahoma 74119, Attorneys for Defendants Tesoro Petroleum Corporation and Wheatley Company, and to James L. Kincaid, Esq., Conner, Winters, Ballaine, Barry & McGowen, 2400 First National Tower, Tulsa, Oklahoma 74103, Attorneys for Defendant Touche Ross & Co., with proper postage fully prepaid thereon.

Richard J. Dent
5549 South Lewis
Tulsa, Oklahoma 74105

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

POWELL ENTERPRISES, INCORPORATED
d/b/a POWELL CONSTRUCTION COMPANY,
a corporation,

Plaintiff,

vs.

SKAGGS SUPERCENTERS, INC., a
Texas corporation,

Defendant.

78-C-244-B

ORDER

On February 13, 1978, a written contract was entered into between Texas Skaggs, Inc., as owner and Powell Enterprises Incorporated, d/b/a Powell Construction Company, as contractor, for the construction of a new Skaggs Drug and Food Supercenter to be located at the northwest corner of South Yale Avenue at East 81st Street in the City of Tulsa, Oklahoma. Article 3 of the Contract (attached to the complaint) provided that the work to be performed under the contract was to be commenced within 10 days from the date of the Notice to Proceed and substantial completion was to be achieved not later than 240 calendar days from the date of the Notice to Proceed. The contract provided for a basic contract price of $1,348,000.00. By letter dated February 24, 1978, defendant gave plaintiff "notice to proceed with the work called for by your contract on the above mentioned project". The letter provided that the "effective date of this notice will be February 24, 1978".

Plaintiff alleges that pursuant to said Contract certain subcontracts and purchase orders to suppliers were let in the approximate sum of $750,000.00.

Plaintiff further alleges that he began clearing and grading the site in question but was ordered to stop by an Order of the City of Tulsa for lack of a building permit.

Plaintiff then alleges that pursuant to the general conditions of the Contract, that he gave the defendant notice to terminate the Contract by letter dated May 25, 1978, on the basis that the City of Tulsa had stopped work on the project for lack of a building permit. (In this connection it is noted that Article 14, ¶14.1.1 of the Contract provides that "[I]f the Work is stopped for a period of thirty days under an order of any court or other public authority having jurisdiction, or as a result of an act of government, ..., then the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for all Work executed and for any proven loss sustained upon any materials, ...)

On May 31, 1978, the defendant responded to the letter of May 25, 1978, by stating, in pertinent part:

> We do not agree with your statement of conditions.
>
> At the time the City of Tulsa decides to issue a building permit, we will expect you to continue the work until completion.

Thereafter, on June 7, 1978, plaintiff commenced this action, seeking a declaration of this Court of plaintiff's rights and obligations with reference to the Contract as follows:

> (a) Was Powell legally justified in terminating the Contract of February 13, 1978?
>
> (b) If Powell was not legally justified in terminating the Contract of February 13, 1978, is Powell legally obligated to resume work on said Contract at such future time, whenever that may be, as Skaggs may comply with the applicable codes, regulations and ordinances of the City of Tulsa? If Powell is so obligated, upon what terms must he proceed?

The second cause of action in said complaint seeks recovery for all work performed, damages, including a reasonable profit, etc., which Powell would be entitled to if the Court determines that Powell was legally justified in terminating the contract.

Defendant filed a Motion to Dismiss for lack of jurisdiction over the subject matter or in the alternative, failure to state a claim upon which relief can be granted.

Plaintiff filed a Motion to Advance Case on the Docket.

The two Motions were referred to the United States Magistrate for Findings and Recommendations.

Thereafter, the Magistrate filed his Findings and Recommendations, wherein he recommended that the defendant's Motion to Dismiss be overruled, and that plaintiff's Motion to Advance Case on the Docket be sustained.

The defendant has filed a Petition to Set Aside Magistrate's Findings and Recommendations. The Court has carefully perused all of the briefs originally filed with the Motions and the briefs submitted by the parties on the Petition to Set Aside Magistrate's Findings and Recommendations.

Defendant's Motion to Dismiss is predicated on the theories that (i) there is no actionable or actual controversy between the parties; (ii) that the declaratory judgment sought will not terminate the controversy; (iii) that it was plaintiff's duty to secure the Building Permit; and (iv) that the Contract provides that controversies arising between the parties should be submitted to arbitration.

Title 28 U.S.C. §2201 provides:

> In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought....

Rule 57 of the Federal Rules of Civil Procedure provides, in pertinent part:

> ....The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

The defendant, in contending that there is no "actionable" or "actual" controversy, asserts that the plaintiff, in the instant litigation, seeks a determination of this Court to the effect that

its prior actions were legally proper under the circumstances. Defendant, therefore, contends that the matter is not one of immediacy and in some respect is premature and, thus, this Court cannot "determine all the issues as would arise between the parties out of the contract in question".

The test promulgated by the Supreme Court of the United States as to "case or controversy" is:

> A "controversy" in this sense must be one that is appropriate for judicial determination. (Case citation ommitted) A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. (Case citation omitted) The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Case citations omitted) It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Case citations omitted). Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. (Case citations omitted)....

Aetna Life Ins. Co. v . Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, Note 5 (1937).

In Bruhn v. STP Corporation, 312 F.Supp. 903 (USDC Col. 1970), an action was instituted by eleven named plaintiffs seeking a declaratory judgment that the noncompetition clauses in their contracts with the defendant were invalid. Defendant moved to dismiss for lack of jurisdiction on the ground that plaintiffs' complaint failed to reveal the existence of a "case or controversy". The initial motion to dismiss was sustained by the trial court, and an amended complaint was filed. Defendant once again moved to dismiss, and said motion was sustained. The Court found that "ripeness" was an element of a case or controversy and that "[a] case or controversy exists only where the danger or dilema of the plaintiff is present and not contingent on the happening of hypothetical future events." Commencing on page 906 the Court said:

> ....One of the main purposes of the Declaratory Judgment Act was to allow a party to bring an action asserting his

"nonliability" in such a situation. (Case citations omitted)

> The federal courts have viewed the Declaratory Judgment Act as remedial and have given it a liberal interpretation in order to carry out its purpose. They have, therefore, normally granted declaratory relief in a second category of disputes---where an immediate controversy exists even though the act which will allegedly create liability has not as yet occurred. Such a situation arises where one or both parties have taken steps or pursued a course of conduct which will result in "imminent" and "inevitable" litigation, provided the issue is not settled and stabilized by a tranquilizing declaration....

The Court concluded that the dispute did not fall within either of the categories, but "[r]ather within a third category which includes disputes which are not yet ripe for adjudication."

In a like case, involving an agreement not to compete, arising out of a franchise agreement, the United States District Court for the Eastern District of Louisiana held in Fine v. Property Damage Appraisers, Inc., 393 F.Supp. 1304, 1309 (USDC ED La. 1975);

> Since there is no breach of contract, the validity of the agreement not to compete is technically not at issue. However, where a real, substantial, and existing controversy between parties to a contract exists, a party may not be compelled to breach the contract in order to determine the legal consequences of that breach, and a declaratory judgment is a proper vehicle for relief. (Case citations omitted) The use of declaratory judgment is particularly compelling where the validity of an anti-competitive clause is questioned because otherwise plaintiff is left to test it only by his breach of contract, subjecting himself to the risk that the clause be held enforceable and that he suffer the severe consequence of being enjoined from working in a similar line of business for a matter of years.

In Kenner Oil & Gas Co. v. Consolidated Gas Utilities Corp., 190 F.2d 985, 989 (10th Cir. 1951) the Court said:

> There existed an actual and continuing controversy.... The fact such transportation would not constitute a breach of the contract until the expiration of the no-prejudice agreement did not prevent the dispute from being a real, substantial, and existing controversy. In such a situation, a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages of other untoward consequence.
>
> The test is whether the facts presented show that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

In Norvell v. Sangre de Cristo Development Co., Inc., 519 F.2d 371 (10th Cir. 1975) the Court said:

> It is fundamental that federal courts do not render advisory opinions and that they are limited to deciding

> issues in actual cases and controversies. U.S.Const. art. 3, §1 et seq.; Barr v. Matteo, 355 U.S. 171, 78 S.Ct. 204, 2 L.Ed.2d 179 (1957); Oklahoma City, Oklahoma v. Dulick, 318 F.2d 830 (10th Cir. 1963). A justiciable controversy is distinguished from a difference or dispute of a hypothetical character or from one that is academic. The controversy must be one admitting to specific relief through a decree of a conclusive character, subject to judicial review. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); Flast v . Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Judicial restraint should be exercised to avoid rendition of an advisory opinion. Detroit Edison Company v. East China Township School District No. 3, 378 F.2d 225 (6th Cir. 1967), cert. denied, 389 U.S. 932, 88 S.Ct. 296, 19 L.Ed.2d 284 (1967).

An additional argument proposed by the defendant is that a declaratory judgment is not proper where "ongoing activity may radically change the factual situation", arguing that if the Court should find that plaintiff did not have legal justification to terminate the contract, that defendant might elect to complete the project itself, thus by implication injecting into this litigation the difference between the "bid" contract price and the "actual" completion cost, relying on the case of Norvell v. Sangre de Cristo Development Co., Inc.,, supra, 378, which states:

> Finally, we hold that declaratory judgments are improper when, as here, ongoing activity may radically change the factual situation. In Mechling Barge Lines v. United States, 368 U.S. 324, 82 S.Ct. 337, 7 L.Ed.2d 317 (1961), the Supreme Court, in holding that declaratory judgment is a remedy committed to judicial discretion, held, inter alia:
>
> > We think that sound discretion withholds the remedy were it appears that a challenged "continuing practice" is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.
> > 368 U.S. 324 at 331, 82 S.Ct. 337 at 341.

The Court finds that the instant case attains a locus standi peculiar to the facts as developed. Plaintiff alleges that it has "terminated" the contract, pursuant to the "contract terms". The question of termination in the future is not the question before the Court. The Court is faced with a fait accompli.

In Borchard Declaratory Judgments (1941 Ed.), page 558 it is stated:

> It has already been observed that the defendant's effort to terminate the contract may result in a request for a declaration by the plaintiff that the contract is still binding or that the defendant has no right to terminate under the circumstances. On the other hand, the plaintiff may claim a declaration of his own privilege to terminate, or that some event had terminated the contract, instead of running the risk of purporting first to terminate or repudiate and thus expose himself to risk and suit. The declaratory action is more prudent, for it places in issue the question whether the defendant or circumstances had given contractual ground for termination, usually the crux of such cases. The plaintiff may seek a determination that by his own act he may terminate his obligation,.... On the other hand, a petition may seek a declaration that a contract has not been terminated, as claimed.... (Emphasis supplied)

The Court finds that what the plaintiff requests in the present litigation is a "negative" declaration that the plaintiff is not liable to the defendant (that the alleged "termination" is valid as tendered by the plaintiff) and not "prospective".

Plaintiff did not "turn on the light" before a "risky leap in the dark". Plaintiff now asks this Court to adjudicate that which plaintiff has already attempted to effectuate. Plaintiff has already exercised the alleged right of termination, and now seeks "guidance" from this Court as to the propriety of such termination.

The relief sought by plaintiff does not rise to the dignity of a "case or controversy" as envisoned and espoused by the Supreme Court of the United States.

The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events---although it may involve future benefits or disadvantages---and the prejudice to his position must be actual and genuine and not merely possible or remote.

Having determined the "case or controversy" issue adversely to plaintiff, this Court need not consider the question raised by plaintiff as to the effect of the arbitration provision contained in the contract.

IT IS, THEREFORE, ORDERED that the Petition to Set Aside Magistrate's Findings and Recommendations be and the same is hereby granted.

IT IS FURTHER ORDERED that the Motion to Dismiss for lack of jurisdiction and failure to state a claim filed by the defendant be and the same is hereby sustained.

IT IS FURTHER ORDERED that this cause of action and complaint be and the same are hereby dismissed.

ENTERED this 15th day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PATTY PRECISION PRODUCTS COMPANY, a corporation,

Plaintiff,

vs.

BROWN & SHARPE MANUFACTURING CO., a corporation; GENERAL ELECTRIC COMPANY, a corporation; and TOOLS CAPITAL CORPORATION, a corporation,

Defendants.

78-C-213-B

FILED

MAR 15 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Heretofore, various and sundry motions were referred to the United States Magistrate for hearing, Findings and Recommendations. After a hearing the Magistrate filed his Findings and Recommendations as to the following Motions:

1. Motion to Dismiss and/or Motion for Summary Judgment of the defendants, Brown & Sharpe Manufacturing Co. and Tools Capital Corporation;

2. Motion to Dismiss and Alternative Motion for Summary Judgment of the defendant, General Electric Company;

3. Motion to Stay Answers to Interrogatories and Production of Documents of the defendants, Brown & Sharpe Manufacturing Company and Tools Capital Corporation;

4. Motion to Stay Discovery of defendant, General Electric Company;

5. Motion to Set Motion to Stay Discovery for Hearing of the plaintiff, Patty Precision Products Company.

The plaintiff, Patty Precision Products Company has filed Objections to the Magistrate's Findings and Recommendations as to the Second Claim for Relief, and asks the Court to overrule the Motions to Dismiss and/or Motions for Summary Judgment filed by the defendants, Brown & Sharpe Manufacturing Company, Tools Capital

Corporation and General Electric Company.

Since no objections have been filed by the parties to the Findings and Recommendations of the Magistrate but as above recited, the Court will deem waived any objections not raised and will affirm and adopt the Findings and Recommendations of the Magistrate as to all of the motions except the Motions to Dismiss and/or Motions for Summary Judgment as to the second claim raised by plaintiff in its complaint.

The second claim (referred to by the parties as the "contract claim") is for the alleged breach of certain express and implied warranties. The Magistrate found that the plaintiff was not in privity with the defendants and recommended that the defendants' Motion to Dismiss the Second Claim for Relief be sustained.

In support of its position that plaintiff has stated a valid second cause of action the plaintiff asserts the following details:

Plaintiff first states that the defendant, Brown & Sharpe Manufacturing Company, examined the technical specifications provided to it by plaintiff and represented to plaintiff that certain machines would fulfill plaintiff's requirements as described in its written specifications and oral negotiations. Plaintiff further states that it was presented brochures prepared by the defendant, Brown & Sharpe which described in detail the essential qualities and capabilities of the machines; and was presented with brochures prepared by the defendant, General Electric Company, which described in detail the essential qualities and capabilities of the electrical control components. Plaintiff further maintains that Brown & Sharpe Manufacturing Company represented to plaintiff in letters and in face-to-face meetings that the machines could be repaired. Plaintiff then states that the defendants, Brown & Sharpe Manufacturing Company and General Electric Company, hid from the plaintiff the existence of a diagnostic tape which could be used as a tool in locating defects in the machines, thereby frustrating plaintiff's own ability to discover the cause of breakdowns in the machines.

In support of these contentions, plaintiff relies on its Complaint and the affidavit of David Johnson, the Quality Manager of Patty Precision Products Company.

The affidavit of Larry Toering, an officer and employee of Marsuco, tendered by the defendant, General Electric Company, in support of its Motion to Dismiss or Alternative Motion for Summary Judgment, states that the three machines which are the subject of this litigation were "purchased by MARSUCO, as a wholesale distributor from Brown & Sharpe Manufacturing Company and subsequently sold retail by MARSUCO to Patty Precision Products Company". The affidavit goes on to state:

> Brown & Sharpe Manufacturing Company, as the manufacturer of the above-described units, made as a part of the sale to MARSUCO the Terms & Conditions of Sale attached as Exhibit "B " and made a part hereof. The warranty of Brown & Sharpe Manufacturing Company is set forth at page 3, paragraph 8 of the Terms & Conditions of Sale.

Plaintiff, as revealed by the complaint, seeks to recover economic losses rather than personal injuries.

At this point, an Oklahoma case, much discussed by all parties, should be reviewed as to its applicability to the facts in the present case. In Hardesty v. Andro Corporation-Webster Division, 555 P.2d 1030 (Okl. 1976), a owner-contractor of an apartment complex initiated a suit against an air-conditioning subcontractor and the manufacturer of a chilling unit, seeking recovery for economic loss resulting from the malfunction of an air-conditioning system. The sub-contractor sought judgment over against the manufacturer. The plaintiff, Hardesty was the owner-contractor of the apartment complex and let an air-conditioning subcontract to one Bradley. The chiller unit of the air conditioning system was manufactured by Andro Corporation-Webster Division (Andro). The owner-contractor experienced major problems in the operation of the air conditioning system and sought recovery of his economic loss caused by the inability of the system to function properly. His action sounded in contract primarily based on warranty and was brought both against the sub-contractor and the manufacturer. The tial court sustained Andro's demurrer as to Hardesty and Hardesty

appealed on that ruling as well as other aspects of the case.

At page 1033 the Court said:

> These actions, including the cross claims, sound in contract. Warranties, either express or implied, are involved. The recovery is for economic loss and not personal injury.... (Emphasis supplied)

It was noted by the Court that the refusal to allow the claim of Hardesty against Andro to go to the jury was based on "lack of privity as between Hardesty and Andro". In this connection the Court said:

> ....Hardesty says the evidence established a contract of express warranty directly from Andro to Hardesty. He thinks of himself as a third party beneficiary, and privity as not essential. He believes 12A O.S.1971, §2-318 may be modified by judicial decree through discretion to extend warranty protection beyond those parties in privity, and beyond those limited parties described in §2-318.
>
> For Hardesty to have a cause of action based on contract against Andro, there must be a contract directly between these two parties that carried with it a warranty, whether express or implied; or Hardesty must be a third party beneficiary of those warranties to have benefit without privity.

The Oklahoma Supreme Court then said:

> Here, Andro, as the manufacturer and supplier, sold the chilling unit to Bradley, the air conditioning sub-contractor, to be used by him in fulfilling his sub-contract with Hardesty. The warranties, whether express or implied, passing with that sale is governed by the Uniform Commercial Code, 12A O.S.1971, §2-101, et seq. Hardesty acknowledges he is not within the third party beneficiaries of warranties as described in §2-318. He seeks an extension of those rights without privity through judicial decree.
>
> We find the rationale of Hester v. Purex Corporation, Okl., 534 P.2d 1306 (1975) to be decisive of this issue. We refuse to extend the protection of warranties to those without privity other than as statutorially provided.
>
> Hester, supra, is shown to be a products liability action for personal injury based on an implied warranty. The opinion quotes from Moss v. Polyco, Inc., Okl., 522 P.2d 622 (1974) saying:
>
> > "The UCC has to do with commercial transactions (12A O.S.1971, §1-102) and presupposes a buyer in privity with a seller, the concept being extended only as provided by the Legislature." (Emphasis added.)
>
> It discusses recommended alternatives to §2-318 by the Permanent Editorial Board of the U.C.C. in 1966 and since Oklahoma's adoption of that code containing §2-318. Alternative B would extend seller's warranty to one reasonably expected to use, consume or be affected by the goods and injured in person. Alternative C makes the same extension to one injured by breach of the warranty and without limitation of injured in person. This is the extension sought here by Hardesty. Hester refused the extension of

Alternative B, saying:

> "Our legislature, since 1966, has had several opportunities to adopt alternatives B or C enlarging the coverage of the U.C.C. It has not chosen to do so."

There has been a legislative session since that decision. "Thus, until the Legislature elects to change the statute, we hold that the U.C.C. Section 2-318" should not be extended by judicial decision. Hester, supra.

Hardesty's position as to third party beneficiary rights outside the U.C.C. is without merit. Here, there was a commercial transaction. It is controlled by the U.C.C. which presupposes privity between the buyer and seller unless that concept is extended by the Legislature. Moss, supra. Sustaining the demurrer to the evidence .... was correct. Privity was absent. It was essential. (Emphasis supplied)

Plaintiff argues, notwithstanding the Hardesty case, supra, that "because plaintiff in this case received brochures directly from defendant Brown & Sharpe and received brochures published by GE, because Brown & Sharpe negotiated directly with plaintiff, and because Brown & Sharpe and GE made continuing covenants with plaintiff with regard to servicing the machines, it is clear that Brown & Sharpe and GE are in direct privity of contract with the plaintiff". Plaintiff further argues that it is not seeking a bare implied warranty of merchantability alone, but alleges implied warranties as a derivation of the express warranties and that once privity of contract and express warranties are established, the implied warranties under the Code are created under the contract.

In Gold Kist Peanut Growers Association v. Waldman, 377 P.2d 807 (Okl. 1962), plaintiff commenced an action against the defendant for alleged wrongful sale of seed peanuts purchased by the defendant from a local dealer in peanuts. Plaintiff alleged that the peanuts had been sold to the dealer by the defendant for resale. On appeal the defendant asserted that the plaintiff never knew the defendant and never had any transaction with the defendant and that the case was tried on the theory of implied warranty, which is a contractual relationship, and that there was no privity between plaintiff and defendant. The Oklahoma Supreme Court ignored these contentions stating:

> These contentions of the defendant are without merit. An examination of the amended petition of the plaintiff and the allegations made therein and as stated above clearly and without question reveal that the plaintiff by his petition

> predicates his action upon fraud, misrepresentation and deceit upon the part of the defendant and not upon the theory of implied contract....

The Speed Fastners, Inc. v. Newsom case, 382 F.2d 395 (10th Cir. 1967) was an action for personal injuries sustained by a carpenter growing out of the Western District of Oklahoma. The Tenth Circuit Court of Appeals found that the "injured employee stands in the shoes of his employer and that his cause of action based on implied warranty is not barred by the shield of privity".

Hunt v. Firestone Tire & Rubber Co., 448 P.2d 1018 (Okl. 1968) was an action against an automobile manufacturer, dealer and tire company for personal injuries sustained by a motorist when an allegedly defective tire blew out causing the vehicle to leave the highway. In finding a contractual relationship between the plaintiff and Firestone, the Court said at page 1022:

> ....The suggestion that there were no contractual relations of any kind between plaintiff and Firestone is erroneous. The written new vehicle warranty that accompanied the sale of the car stated that no warranty was made by General Motors as to the tires and generally informed plaintiff as to the tire manufacturer's guarantee concerning the tires. Plaintiff was given a Firestone certificate new tire guarantee, which was introduced in evidence by plaintiff. There was a contractual relationship between plaintiff and Firestone.

The three above cited cases, i.e. Gold Kist Peanut, Speed Fastners, and Firestone cases, supra, are relied on by the plaintiff in support of its position. As denoted above, the Gold Kist Peanut case was not decided on warranty and the Speed Fastners and Firestone cases involved personal injury and not economic loss. Additionally, as noted above the Firestone case, supra, is distinguishable from the case at bar in that plaintiff was actually given a certificate of new tire guarantee, which established the contractual relationship.

In addition to relying on the Firestone case, supra, to sustain its position that the brochures received by plaintiff (brochures of Brown & Sharpe and GE) constituted "express warranties", the plaintiff relies on the cases of Fargo Machine & Tool Co. v. Kearney & Tractor Corp., 428 F.Supp. 364 (E.D.Mich. 1977) and Whitaker v. Farmland, Inc., 567 P.2d 916 (Mont. 1977)---both cases from other forums and jurisdictions than Oklahoma.

It is elemental that a federal district court, whose jurisdiction is predicated upon diversity of citizenship, must apply the substantive law of the State in which it sits.

Plaintiff has not controverted the evidence available in the file that plaintiff did not purchase the machines in question from Brown & Sharp Manufacturing Company and General Electric Company. The evidence does reflect that plaintiff purchased three machines from Marsuco. The evidence further reflects that the sale as to one of the three machines was rescinded as to all parties and that thereafter Brown & Sharpe Manufacturing Company sold the machine to Tools Capital Corporation, who in turn leased the machine to Patty Precision Products Company.

This Court is constrained to reject the arguments proposed by the plaintiff in regard to the Second Cause of Action or Claim. Plaintiff in the instant case complains of economic loss, not personal injury loss. Under the Hardesty case, supra, above cited, there must be privity of contract to sustain the cause of action asserted by the plaintiff.

IT IS, THEREFORE, ORDERED that the Objections of the plaintiff, Patty Precision Products Company, to the Findings and Recommendations of the Magistrate be overruled.

IT IS FURTHER ORDERED as follows:

1. That the Motions to Dismiss and/or Motion for Summary Judgment of the defendants, Brown & Sharpe Manuracturing Company, General Electric Company and Tools Capital Corporation, be and the same are hereby sustained as to the Second Claim for Relief of the Complaint, and are overruled as to the First and Third Claims for Relief of the Complaint, there being no objection lodged by the parties as to the recommendation of the Magistrate as to the First and Third Claims for Relief

2. That the Findings and Recommendations of the Magistrate as to the balance of the referred motions (to which no objections have been lodged) are adopted and affirmed by the Court as if set forth at length herein.

ENTERED this 15th day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 15 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiff,

vs.

JAMES S. HOAGLAND and HARRY J. HOAGLAND,

Defendants,

vs.

PAUL E. NEELY d/b/a NEELY INSURANCE AGENCY,

Third-Party Defendant.

NO. 78-C-558-C

O R D E R

The plaintiff herein seeks a declaration of its non-liability to the defendants, its insureds, under a fire insurance policy. The defendants have filed a counterclaim against the plaintiff in which they allege in their First Cause of Action that the contract of insurance should be reformed according to oral representations made by plaintiff's agent, thereby allowing their recovery from the plaintiff of the proceeds of the insurance policy. In their Second Cause of Action, the defendants allege that the plaintiff has arbitrarily and capriciously refused to pay the proceeds of the insurance policy, for which the defendants seek monetary damages. In addition, the defendants allege that such conduct of the plaintiff was willful and they seek an award of exemplary damages therefor. Defendants have also filed a third-party complaint against plaintiff's agent. They allege therein that the third-party defendant breached his oral contract to provide them with a correct and proper insurance policy, and that therefore, if the defendants are not entitled to recover under the insurance policy, the third-party defendant is liable to the defendants for an amount equal to the proceeds of that policy. The plaintiff has also filed a claim against the third-party defendant. The plaintiff alleges therein that if the defendants are allowed to recover the proceeds of the insurance policy under their counterclaim against the

plaintiff because of representations made by the third-party defendant, then the third-party defendant would be liable over to the plaintiff for such sums, said representations being unauthorized and a breach of the third-party defendant's fiduciary duty to the plaintiff. Now before the Court is the third-party defendant's motion to dismiss the claim which plaintiff makes against him.

The third-party defendant contends that the rights plaintiff claims to have against him will not accrue, under Oklahoma law, until the plaintiff is determined to be liable to the defendants, and that liability has been satisfied by payment to the defendants. The third-party defendant therefore argues that because plaintiff's liability to the defendants has not been determined, and because the plaintiff has not satisfied that liability, plaintiff has failed to state a claim against him.

Under Rule 14(a) of the Federal Rules of Civil Procedure, "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff...." This language is more restrictive than the provisions allowing the initial third-party complaint. Rule 14(a) provides that a defendant may file a third-party complaint against "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Under Rule 14(b) a plaintiff may bring in a third party under the same circumstances when a counterclaim has been filed against the plaintiff.

The claim of the plaintiff in the instant case obviously does not fall under Rule 14(b). The claim is asserted against one already a party. Furthermore, because plaintiff's claim was filed more than ten (10) days after its answer to the counterclaim, Rule 14(a) would require the plaintiff to obtain leave of the Court to file its claim as a third-party complaint. The plaintiff did not apply to the Court for leave to file its claim against the third-party defendant.

The arguments of both the plaintiff and the third-party defendant mistakenly assume that the "is or may be liable" language of Rule 14 applies to plaintiff's claim. If this were so, it is clear that the third-party defendant's motion to dismiss would be without merit.

In Chicago, Rock Island & Pacific R. Co. v. Davila, 489 P.2d 760 (Okla. 1971), cited by the third-party defendant, the court held that a claim that would have the effect of accelerating liability could be joined under an Oklahoma statute which the court interpreted as allowing impleader of those who "may be liable", but that a separate trial could be ordered on that claim to avoid the acceleration problem. 489 P.2d at p. 764. The court noted that the federal courts often follow the same practice, Id.

However, the language in Rule 14(a) covering a plaintiff's claim against a third-party defendant is identical to the language therein covering a third-party defendant's claim against the plaintiff. The later provision has been interpreted as only allowing the assertion of "matured" claims. See Stahl v. Ohio River Company, 424 F.2d 52 (3rd Cir. 1970). That decision is dispositive of the question now before the Court. Plaintiff's claim against the third-party defendant will not "mature" until the defendants have recovered from the plaintiff on their counterclaim.

For the foregoing reasons, it is therefore ordered that the third-party defendant's motion to dismiss the plaintiff's claim against him is hereby sustained.

Dated this 15th day of March, 1979.

H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY DON WESLEY MAYNARD, # 77766, Petitioner, v. JERRY SUNDERLAND, Warden, et al., Respondents.	)	NO. 79-C-110
LARRY DON WESLEY MAYNARD, # 77766, Plaintiff, v. ROY E. KIRKLAND, et al., Defendants.	)	NO. 79-C-120

O R D E R

The Court has for consideration petitions filed pro se, in forma pauperis, by Larry Don Wesley Maynard, and assigned Cases No. 79-C-110 and No. 79-C-120. Case No. 79-C-110 is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Case No. 79-C-120 is presented as a civil rights complaint pursuant to 42 U.S.C. § 1983, however, the only relief sought is retrial, a time cut or immediate release from the custody of the State of Oklahoma. The Supreme Court of the United States in Preiser v. Rodriguez, 411 U. S. 475 (1973) held that, ". . . when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release, or a speedier release, from that imprisonment, his sole federal remedy is a writ of habeas corpus." Therefore, the cause before this court in Case No. 79-C-120, in accordance with the facts alleged, relief sought, and law, should be treated as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and Jerry Sunderland, Warden, Granite Reformatory, Granite, Oklahoma, added on the court's own initiative as a party respondent in Case No. 79-C-120 in accordance with Rule 20, Federal Rules of Civil Procedure.

Petitioner is a prisoner at the Granite Reformatory, Granite, Oklahoma, serving an indeterminate sentence of from 12 to 36 years' imprisonment, upon conviction by the court of burglary in the second degree after former conviction of a felony in the District Court of Tulsa County, State of Oklahoma, Case No. 23324. On direct appeal, Case No. A-15248, the Oklahoma Court of Criminal Appeals, affirmed the judgment and con-

viction. Maynard v. State, Okl. Cr., 473 P.2d 335 (1970). The "single question" raised on appeal as shown in the reported opinion was that in the prior conviction relied upon by the State of Oklahoma, the Defendant (Petitioner herein) was not represented by counsel and had not effectively waived the same.

The ground for relief asserted in both cases before this court is that a prosecution witness, Officer Roy Kirkland, committed perjury by testifying that the fingerprint card on file for Petitioner was taken May 9, 1968, and instead, said card had to have been taken on May 17, 1968. It is Petitioner's contention that the fingerprint card used in trial was not his and he would not have been convicted except for this fraudulent testimony, which was known to the prosecutor. Therefore, the action in both cases, 79-C-110 and 79-C-120, involve a common question of fact and law and should be consolidated in accordance with Rule 41(a), Federal Rules of Civil Procedure.

Although Petitioner asserts in his petitions under consideration that he does not know know what issues were raised in his direct appeal, he unequivocally states that the issue of perjury by a state witness has not been presented to the state courts for determination by appeal, post-conviction or habeas corpus proceeding. Therefore, no response or evidentiary hearing herein is required and the petitions before this court should be denied without prejudice until adequate and available state remedies have been exhausted.

The State of Oklahoma provides remedies to resolve Petitioner's claims by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and by habeas corpus pursuant to 12 O.S.A. § 1331, et seq. Until Petitioner has availed himself of the adequate and available procedures through the highest state court, his state remedies are not exhausted and his petition to this federal court is premature. 28 U.S.C. § 2254(b). No principle in the realm of federal habeas corpus is better settled than that state remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, Supra.; Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether

a matter should first be determined by the state courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegel v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

IT IS, THEREFORE, ORDERED that Jerry Sunderland, Warden, Granite Reformatory, Granite, Oklahoma, be and he is hereby added as a party respondent in Case No. 79-C-120, that said action be and it is treated as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and that Case No. 79-C-120 be and it is consolidated with Case No. 79-C-110.

IT IS FURTHER ORDERED that the petitions for writ of habeas corpus of Larry Don Wesley Maynard in consolidated Cases No. 79-C-110 and No. 79-C-120 be and they are hereby denied for failure to exhaust adequate and available state remedies and the cases are dismissed without prejudice.

Dated this 14th day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY DON WESLEY MAYNARD, # 77766, Petitioner, v. JERRY SUNDERLAND, Warden, et al., Respondents.	)	NO. 79-C-110
LARRY DON WESLEY MAYNARD, # 77766, Plaintiff, v. ROY E. KIRKLAND, et al., Defendants.	)	NO. 79-C-120

O R D E R

The Court has for consideration petitions filed pro se, in forma pauperis, by Larry Don Wesley Maynard, and assigned Cases No. 79-C-110 and No. 79-C-120. Case No. 79-C-110 is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Case No. 79-C-120 is presented as a civil rights complaint pursuant to 42 U.S.C. § 1983, however, the only relief sought is retrial, a time cut or immediate release from the custody of the State of Oklahoma. The Supreme Court of the United States in Preiser v. Rodriguez, 411 U. S. 475 (1973) held that, ". . . when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release, or a speedier release, from that imprisonment, his sole federal remedy is a writ of habeas corpus." Therefore, the cause before this court in Case No. 79-C-120, in accordance with the facts alleged, relief sought, and law, should be treated as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and Jerry Sunderland, Warden, Granite Reformatory, Granite, Oklahoma, added on the court's own initiative as a party respondent in Case No. 79-C-120 in accordance with Rule 20, Federal Rules of Civil Procedure.

Petitioner is a prisoner at the Granite Reformatory, Granite, Oklahoma, serving an indeterminate sentence of from 12 to 36 years' imprisonment, upon conviction by the court of burglary in the second degree after former conviction of a felony in the District Court of Tulsa County, State of Oklahoma, Case No. 23324. On direct appeal, Case No. A-15248, the Oklahoma Court of Criminal Appeals, affirmed the judgment and con-

viction. Maynard v. State, Okl. Cr., 473 P.2d 335 (1970). The "single question" raised on appeal as shown in the reported opinion was that in the prior conviction relied upon by the State of Oklahoma, the Defendant (Petitioner herein) was not represented by counsel and had not effectively waived the same.

The ground for relief asserted in both cases before this court is that a prosecution witness, Officer Roy Kirkland, committed perjury by testifying that the fingerprint card on file for Petitioner was taken May 9, 1968, and instead, said card had to have been taken on May 17, 1968. It is Petitioner's contention that the fingerprint card used in trial was not his and he would not have been convicted except for this fraudulent testimony, which was known to the prosecutor. Therefore, the action in both cases, 79-C-110 and 79-C-120, involve a common question of fact and law and should be consolidated in accordance with Rule 41(a), Federal Rules of Civil Procedure.

Although Petitioner asserts in his petitions under consideration that he does not know know what issues were raised in his direct appeal, he unequivocally states that the issue of perjury by a state witness has not been presented to the state courts for determination by appeal, post-conviction or habeas corpus proceeding. Therefore, no response or evidentiary hearing herein is required and the petitions before this court should be denied without prejudice until adequate and available state remedies have been exhausted.

The State of Oklahoma provides remedies to resolve Petitioner's claims by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and by habeas corpus pursuant to 12 O.S.A. § 1331, et seq. Until Petitioner has availed himself of the adequate and available procedures through the highest state court, his state remedies are not exhausted and his petition to this federal court is premature. 28 U.S.C. § 2254(b). No principle in the realm of federal habeas corpus is better settled than that state remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, Supra.; Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether

a matter should first be determined by the state courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegel v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

IT IS, THEREFORE, ORDERED that Jerry Sunderland, Warden, Granite Reformatory, Granite, Oklahoma, be and he is hereby added as a party respondent in Case No. 79-C-120, that said action be and it is treated as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and that Case No. 79-C-120 be and it is consolidated with Case No. 79-C-110.

IT IS FURTHER ORDERED that the petitions for writ of habeas corpus of Larry Don Wesley Maynard in consolidated Cases No. 79-C-110 and No. 79-C-120 be and they are hereby denied for failure to exhaust adequate and available state remedies and the cases are dismissed without prejudice.

Dated this 14th day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MITCHELL K. START, Defendant-Movant,	)	
v.	)	NOS. 79-C-1
	)	78-CR-96
UNITED STATES OF AMERICA, Plaintiff-Respondent.	)	

O R D E R

The court has for consideration a motion filed pro se by Mitchell K. Stark. The cause has been assigned civil Case No. 79-C-1 and docketed in his criminal Case No. 78-CR-96.

Movant is a prisoner at the Stringtown Correctional Center, Stringtown, Oklahoma, serving a sentence from the State of Oklahoma. Movant states on page No. 6 of his motion, "I am not being held unlawfully, I am mearily asking the Court to run my Federal Sentence concurrent with my State Sentence". To support this request, he asserts that he entered his pleas of guilty to the federal charges upon agreement with the U. S. Attorney that if he pled guilty to Counts V and VI of the indictment the first four counts would be dismissed and the U. S. Attorney would agree not to oppose defendant's request that any federal sentence run concurrently with the state sentence he was serving. Movant contends that this concurrency part of the plea agreement was not kept in that it was not mentioned to the court at sentencing.

The United States District Judge who conducted the plea and sentencing proceedings is deceased, but as a regularly assigned judge of this court and having carefully reviewed the file and proceedings to date, the court finds that no response or evidentiary hearing is required herein. The motion considered as a request for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, is timely filed within 120 days of the date of sentence. The motion, giving it the liberal construction required of pro se proceedings, McKinney v. Taylor, 344 F.2d 854 (10th Cir. 1965); Chase v. Crisp, 523 F.2d 595 (10th Cir. 1975) cert. denied 424 U. S. 947 (1976), may be and is also considered as a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. As either, a § 2255 or Rule 35 motion, it is without merit and should be overruled.

Movant in the federal prosecution was charged by six-count indictment with false statements in the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6) in each of Counts I, III and VI; and with receiving a firearm transported in interstate commerce after conviction of a felony in violation of 18 U.S.C. §§ 922(h) and 924(a) in each of Counts II, IV and V. He pled guilty to Counts V and VI, and Counts I, II, III and IV were dismissed upon the U. S. Attorney's motion pursuant to Rule 48(a), Federal Rules of Criminal Procedure. Movant was sentenced November 15, 1978, on Count V to five years, eligible for parole as the Parole Commission might determine pursuant to 18 U.S.C. § 4205(b)(2) after one year which Movant should use to learn a trade. On Count VI, the imposition of sentence was suspended and the Movant was placed on three years' probation to commence on expiration of the sentence in Count V. There was no appeal.

At the plea of guilty on October 10, 1978, the government and defense attorneys informed the trial court of the plea agreement, and the Defendant (Movant herein) admitted that the agreement was accurately stated by counsel and as he understood it. The agreement of record was that in return for the plea of guilty to Counts V and VI of the indictment, and the court's acceptance thereof, the government would move for dismissal of Counts I, II, III and IV. Further, the prosecutor admitted that the government had agreed not to oppose the recommendation of the defense for a sentence to no more than seven years to run concurrently with a seven-year sentence the Defendant was serving in the State of Oklahoma, but both counsel recognized in the presence of the Defendant in open court that the court was not bound by any agreement regarding the sentence to be imposed. Immediately upon this colloquy, the sentencing judge explained to the Defendant that the court had not participated in any way in the plea bargaining and was not bound by any plea agreement. The court stated in part:

> "I'll say this, I'll accept on the record your part of the plea agreement that the government will not suggest any particular sentence, and you may suggest a particular sentence, but I'll say at this time the court is not going to accept the plea agreement until I see his presentence report."

The Defendant was given the opportunity to proceed with his plea or withdraw it. Defendant chose to go forward with the plea knowing and understanding that the agreement as to sentence was not binding on the court

and thereby freely, with knowledge and understanding, waived the sentencing recommendation part of the plea agreement by the government.

Nevertheless, at sentencing, defense counsel again requested a sentence as set out in the plea agreement stated of record at the change of plea. Government counsel did not oppose this recommendation, but stated the government would stand on the presentence report. It might well have been better for government counsel to have reiterated that pursuant to the plea agreement of record at the change of plea the government was bound not to oppose the recommendation, and such failure of exact or specific performance would usually require vacation of the judgment and sentence and permit the Defendant to plead anew. See, Santobello v. New York, 404 U. S. 257 (1971). However, in the circumstances before the court, where Rule 11, Federal Rules of Criminal Procedure, and constitutional safeguards were fully met, where the Defendant was advised by the court prior to his plea that the recommended sentence part of the plea agreement was not binding on the court, was informed of the maximum sentence for the crimes charged, was advised that the court could impose any sentence so long as it did not exceed the maximum provided by law, and the Defendant was given the opportunity to withdraw his plea of guilty or go forward as he chose, this court finds no breach of the plea agreement that would invalidate the plea.

Although sentences on federal charges in separate counts, or in separate cases, are presumed to run concurrently absent specific provisions to the contrary, Owensby v. United States, 385 F.2d 58 (10th Cir. 1967); Subas v. Hudspeth, 122 F.2d 85 (10th Cir. 1941), this rule of "presumptive concurrence" is not applicable where one sentence is imposed by a state court and the other by a federal court. Verdigo v. Willingham, 198 F.Supp. 748 (M.D.Pa. 1961) affirmed 295 F.2d 506 (3rd Cir. 1961); Gomori v. Arnold, 533 F.2d 871 (3rd Cir. 1976); also see, Joslin v. Moseley, 420 F.2d 1204 (10th Cir. 1969). Further, pursuant to 18 U.S.C. § 3568 and § 4082(A), the Attorney General has the exclusive power to designate the place where federal sentences shall be served. Stillwell v. Looney, 207 F.2d 359 (10th Cir. 1953); Werntz v. Looney, 208 F.2d 102, 103 n. 2 (10th Cir. 1953). The Tenth Circuit Court of Appeals has held that the place of confinement is no part of the sentence, but is a matter for the determination of the Attorney General; and therefore, that it is

beyond the power of a federal court to order that its sentence be served concurrently with a state sentence. The concurrency language is surplusage or a recommendation as to place of confinement. Bowen v. United States, 174 F.2d 323 (10th Cir. 1949); Joslin v. Moseley, 420 F.2d 1204 (10th Cir. 1969); Sluder v. Malley, No. 77-1454 unpublished (10 Cir. filed Dec. 22, 1977). The Attorney General has the discretion, may, and frequently does, honor the recommendation that the federal sentence be served concurrently with a state sentence in a state institution. See, Stillwell v. Looney, Supra.; Werntz v. Looney, Supra. However, the Attorney General is under no obligation to do so and could disregard the sentencing court's recommendation. See, Bowen v. United States, Supra. Therefore, in the matter before the court, the sentencing judge having been fully informed as to the plea agreement, and the intent of his sentence being clear from the proceedings that he wished the federal sentence to follow the state sentence in hopes that the Movant would become skilled in a trade and be able to avoid future conflicts with the law, this court declines to reduce the sentence.

IT IS, THEREFORE, ORDERED that the motion of Mitchell K. Stark considered as pursuant to 28 U.S.C. § 2255 to vacate sentence as well as considered pursuant to Rule 35, Federal Rules of Criminal Procedure, for reduction of sentence be and it is hereby overruled.

Dated this 14th day to March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff-Respondent,	)	
v.	)	NOS. 78-C-406
	)	77-CR-139
DONA MARIE HERRINGTON, Defendant-Movant.	)	

ORDER

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 filed pro se by Dona Marie Herrington. The cause has been assigned civil Case No. 78-C-406 and docketed in her criminal Case No. 78-CR-19.

Movant is a prisoner at the Federal Correctional Institution, Fort Worth, Texas, serving a sentence of three years' imprisonment following conviction on a plea of guilty to Counts One, Four and Nine of a nine-count indictment. Counts One and Four, each, charged possession of a check knowingly stolen from the mail in violation of 18 U.S.C. § 1708, and Count Nine charged uttering and publishing a check known to be falsely made and forged in violation of 18 U.S.C. § 495. She was sentenced April 6, 1978, to the maximum for study and report pursuant to 18 U.S.C. § 4205. After receipt of the § 4205 report, definitive sentence was imposed July 11, 1978, to three years' imprisonment as to each of Counts One and Four, the sentence on Count Four to run concurrently with the sentence on Count One. On Count Nine, the imposition of sentence was suspended and she was placed on three years' probation to follow her incarceration on Counts One and Four.

As grounds for her § 2255 motion, Movant claims that she is being deprived of her liberty in violation of her rights guaranteed by the Constitution of the United States in that:

1. Her plea was unlawfully induced and not made voluntarily with her understanding of the nature of the charge or consequences of the plea.

2. She was denied compulsory process to obtain witnesses favorable to her.

3. The sentence imposed is cruel and unusual.

The United States District Judge who conducted the plea and sentencing proceedings is deceased, but as a regularly assigned judge of

this Court having carefully reviewed the motion, response and supplement thereto, file and transcript of the plea and sentence, and being fully advised in the premises, the Court finds that no evidentiary hearing is required and the § 2255 motion is without merit and should be overruled.

Review of the plea and sentencing transcript supports that Movant had sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding and she had a rational, as well as, a factual understanding of the proceedings against her. Her plea of guilty was in full conformity with Rule 11, Federal Rules of Criminal Procedure, and constitutional safeguards. The charges and maximum possible sentence were fully explained to the Movant by the sentencing court. She, under oath to answer truthfully, stated that she understood her right to jury trial, at which she had a right to counsel, to confront and cross-examine the witnesses against her, and not to be compelled to incriminate herself; and she freely and knowingly waived those rights, understanding that by the waiver she would have no trial but that her innocence or guilt would be determined by the Court. She was in no way denied compulsory process to obtain witnesses in her favor, but chose to plead guilty while represented by able and competent counsel rather than have a trial. She admitted that her plea of guilty was made voluntarily and completely of her own free choice, that she had not been forced or threatened in any way to plead guilty, and that she was satisfied with the services of her attorney. The plea agreement that upon the Court's acceptance of Movant's plea of guilty to Counts One, Four and Nine, the other six counts would be dismissed appears of record and Movant admitted that the agreement was as she understood it. Further, Movant appeared before the Court for plea with a broken leg and she made known to the Court that she was taking Codeine for pain, and claimed that she had taken Mellaril and Benadryl for some time because she suffered from "leukemia". The Court examined as to whether the medication was in any way affecting her ability to understand the plea proceedings. Movant admitted that the checks involved were taken from a mailbox, signed and cashed as charged in the indictment with her knowing it was against the law to do so. Movant as a final admission

stated, "Well, I did it because I was forced to." without further explanation as to the reason for her commission of the crimes. (See, plea transcript pp. 4-14)

Statements given at a Rule 11 proceeding should be given conclusive effect in the absence of a believable reason justifying a departure from the apparent truth of those statements. Hedman v. United States, 527 F.2d 20 (10th Cir. 1975); United States v. Bambulos, 571 F.2d 525 (10th Cir. 1978). See also, United States v. Stassi, 583 F.2d 122 (3rd Cir. 1978). A plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same. United States v. Woosley, 440 F.2d 1280 (8th Cir. 1971); Chaney v. United States, No. 76-1116 Unreported (10th Cir. filed Jan. 4. 1977).

The sentence imposed was well within the maximum provided by law. Such a sentence is not subject to attack on the ground of severity in a direct appeal or a collateral proceeding. Randall v. United States, 324 F.2d 726 (10th Cir. 1963).

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Dona Marie Herrington be and it is hereby overruled and dismissed.

Dated this 15th day of March, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SATELLITE COMMUNICATION SYSTEMS, INC.
a Tennessee corporation,

Plaintiff,

v.

RCA AMERICAN COMMUNICATIONS, INC.,
a Delaware corporation,

Defendant.

NO. 78-C-509

ORDER

The Court has before it plaintiff's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. This was an action to enforce an alleged contract. As grounds for its motion, plaintiff argues that the decision of this Court of November 27, 1978, was against the weight of the evidence and contrary to established principles of law. Plaintiff further argues that the Court failed to render findings of facts or conclusions of law as to plaintiff's arguments on contract by estoppel, or waiver. Finally, plaintiff submits that the Court's findings that plaintiff's president, Mr. Taylor, did not accept defendant's offer on September 7, 1978, is unsupported by the evidence presented at trial and contrary to the "true" facts as shown in the affidavit of Edward L. Taylor, attached to the motion now before the Court. The testimony contained in this affidavit was not offered at trial.

In its decision on November 27, 1978, this Court found that the parties had agreed that defendant would provide satellite communications service to plaintiff on its horizontal transponder channel 18.

> "The defendant had, in writing, informed the plaintiff that it had reserved the service for the plaintiff. The plaintiff abandoned its negotiations with Western Union upon the reliance of these representations of the defendant. The service was to commence on August 1st of 1978." Trans., Nov. 27, 1978, p. 67.

The Court further found that this agreement was modified by plaintiff in its letter dated January 3, 1978 (Plaintiff's Exhibit No. 6). In that letter, plaintiff imposed two conditions, the second being that if the

Federal Communications Commission (FCC) had failed to approve plaintiff's application as a common carrier by August 1, 1978 -- the date the service was to commence -- that service would be "delayed accordingly without any liabilities under your tariffs." (Plaintiff's Exhibit No. 6, Para. 3.) In other words, plaintiff would not owe defendant for use of channel 18 until FCC approval was granted, even though the channel was reserved as of August 1. Mr. Taylor testified that this condition was imposed by plaintiff and accepted by defendant in the mutual belief that the FCC would act no later than the first two weeks of September. Trans. Oct. 20, 1978, p. 61. From this, the Court found that the agreement did not bind defendant to hold channel 18 service for an unreasonable period while receiving no fees, since that would be an unreasonable bargain.

> "However, it's also clear that in the event the service was not accepted on August 1st, 1978, the plaintiff's application for service as a common carrier not having been approved prior to that August 1, '78 date, the defendant was under no obligation to hold the transponder channel 18 for an indefinite and interminable period of time, available solely for the benefit of the plaintiff, to the exclusion of all other customers, unless subsequent conduct of the parties, plaintiff and defendant, evidenced an agreement to the contrary." Trans., Nov. 27, 1978, p. 68.

If an unreasonable time passed after August 1, the status of the agreement would be determined by further conduct of the parties. On September 7, 1978, plaintiff was advised that it would be given seven days notice when defendant had a firm offer or order from a third party, at which time plaintiff would have to begin to pay for the service in order to retain channel 18. The Court then found that there was no evidence of plaintiff's acceptance of this requirement. Trans., Nov. 27, 1978, p. 69. The Court stated further, on page 70:

> "The record does not establish that the plaintiff ever agreed to assume payments prior to the announcement of the bidding process. In fact, to the contrary, plaintiff was endeavoring to hold a conference in Memphis, Tennessee, presumably to explain the situation to Mr. Wilson for the purpose of aiding it at arriving at a decision as to what course it should follow."

From this, the Court concluded that plaintiff had no prior right to service on channel 18 after August 1, 1978. Trans., Nov. 27, 1978, p. 71.

This conclusion necessarily dispenses arguments of estoppel and waiver. Since the Court found a contract did exist through August 1, contingent on FCC approval, estoppel and waiver are irrelevant as to any pre-August 1 contract. Plaintiff argues that the conduct of the parties shows the existence of a post-August 1 agreement, requiring the application of estoppel or waiver. But the Court made a specific finding that the conduct of the parties did not reveal the existence of an agreement running indefinitely, and found no response to defendant's offer of September 7 to allow plaintiff to continue the agreement by paying for the service after defendant received another order for that service.

Plaintiff admits that "[t]he existing record is silent with respect to the specific response made by Taylor to Rice during that conversation", (i.e., as to defendant's offer of September 7). See Plaintiff's Motion for New Trial, p. 5. Plaintiff then requests the "evidentiary hearing be reopened so that Taylor may testify further". Id.

Plaintiff seeks consideration for evidence not offered at trial. It is well settled that new evidence may be considered as grounds for a new trial only where it was not discoverable by due diligence at trial. Rule 59(b), Federal Rules of Civil Procedure. Valmont Industries, Inc. v. Enresco, Inc., 446 F.2d 1193 (10th Cir. 1971). Plaintiff has made no showing of due diligence, or offered any excuse as to its failure to offer the testimony it now seeks to present. In a similar situation, the 5th Circuit held that where a man was not made a witness during trial, his affidavit offered later could not compel the Court to grant a new trial.

> "Walker's claim that he could not have foreseen that the trial court would reject his claim without Hall's testimony is the claim of every defeated plaintiff. Walker's omission cannot now require a new trial." In re Westrec Corp., 434 F.2d 195 (5th Cir. 1970).

In the instant case, plaintiff had the particular witness on the stand, but failed to inquire as to his response to defendant's offer of September 7, 1978. The failure of plaintiff's counsel to produce this evidence is not grounds for a new trial. The parties filed a Stipulation on November 2, 1978, that stated in part:

> "The plaintiff, Satellite Communication Systems, Inc., and the defendant, RCA American Communications, Inc., hereby stipulate, by and through their respective counsel of record, that the Court may enter an order, without further notice to the parties, as follows:
>
> . . .

> 4. That the Court may determine, on the basis of the evidence presented at the hearing conducted upon plaintiff's application for a preliminary injunction, the following issues: (a) the liability of defendant, if any, on plaintiff's claims for relief; and (b) plaintiff's right, if any, to the preliminary injunction requested in the complaint."

Plaintiff's present motion is clearly contrary to that stipulation.

Moreover, it is not clear that plaintiff's new evidence would alter the results. Wright states that "(n)ewly discovered evidence that would merely effect the weight and credibility of the evidence is ordinarily insufficient for a new trial...." Wright and Miller, Federal Practice and Procedure, Vol. 11, p. 60. Plaintiff's newly offered affidavit is material, but would not necessarily change the opinion of the Court. In addition to finding that there was not evidence of plaintiff's acceptance of defendant's September 7th terms, the Court also found that:

> "...to the contrary, plaintiff was endeavoring to hold a conference in Memphis, Tennessee, presumably to explain the situation to Mr. Wilson for the purpose of aiding in at arriving at a decision as to what course it should follow." Trans., Nov. 27, 1978, p. 70.

The fact that the newly offered evidence might change the result is not enough to compel a new trial.

On review of the record, it is clear the decision of this Court of November 27, 1978, was in accord with the weight of the evidence. The only contrary evidence is offered by affidavit after the decision was rendered. That evidence is offered contrary to a pre-trial stipulation, without excuse as to its non-production at trial, and goes merely to the weight of the evidence. It does not show that an opposite decision would likely have resulted had it been offered at trial. It appears, rather, to be the product of 20-20 hindsight.

Plaintiff's issues of estoppel and waiver were necessarily considered in the Court's finding that the conduct of the parties did not evidence an obligation at the time defendant committed channel 18 to other customers. Plaintiff raises no other issues in its contention that this Court's decision was "contrary to established principles of law."

For the foregoing reasons, it is hereby Ordered that plaintiff's motion for a new trial be overruled.

It is so ordered this 14th day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKC CORP., Plaintiff, vs. THE AETNA CASUALTY & SURETY COMPANY and SOUTH PRAIRIE CONSTRUCTION COMPANY, Defendants, vs. OKC REFINING, INC., and OKC TRADING COMPANY, Additional Party Defendants to Counterclaim.	)	No. 75-C-523-C

ORDER OF DISMISSAL WITH PREJUDICE

On this 13th day of March, 1979, the Court has for consideration, the application of all parties to the above-entitled action for order of dismissal with prejudice. Upon consideration of the application,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' counterclaim in the above-entitled action be, and the same is hereby, dismissed with prejudice.

/s/ H Dale Cook

H. Dale Cook, Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 12 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-319-B
JOSEPH P. GRAYSON and MIGNON E. GRAYSON, husband and wife, d/b/a JUST PLANTS, et. al., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Tulsa County Treasurer and the Board of County Commissioners, Tulsa County, by and through their attorney, John F. Reif, Assistant District Attorney for District 14, and Federal National Mortgage Association, a Corporation, by and through its attorney, William F. Tucker, Jr., and stipulate and agree that this action be and the same is hereby dismissed, without prejudice, each party bearing its own costs.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

JOHN F. REIF
Assistant District Attorney
Attorney for County Treasurer,
Tulsa County, and Board of
County Commissioners, Tulsa County

WILLIAM F. TUCKER, JR.
Attorney for Federal National
Mortgage Association, a Corporation

cl

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEABODY PIPELINE TESTING COMPANY,	)	
Plaintiff,	)	
vs.	)	Case No. 78-C-519-B
AMERICAN TESTERS, INC.,	)	
Defendant.	)	

JUDGMENT UPON AGREED STATEMENT OF FACTS

On this 9th day of March, 1979, this cause comes on for consideration upon the Agreed Statement of Facts filed by the parties herein, and the Court having considered said Agreed Statement of Facts finds that Plaintiff is entitled to judgment and should have judgment in the sum of $18,024.74, together with interest thereon at the rate of ten percent (10%) per annum from this date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover judgment against Defendant in the sum of $18,024.74, together with interest thereon at the rate of ten percent (10%) per annum from this date.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER W. McWHIRT,

Defendant.

CIVIL ACTION NO. 79-C-43-C

NOTICE OF DISMISSAL

COMES NOW the United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby dismisses this action, without prejudice.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

pj

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOBBY JO HARRISON and REGINA HARRISON, husband and wife,	)	
Plaintiffs,	)	FILED
and	)	MAR 8 19
AMERICAN MOTORISTS INSURANCE COMPANY,	)	Jack C. Silver, Clerk U. S. DISTRICT COURT
Third Party Plaintiff,	)	
vs.	)	No. 77-C-181-C
LION UNIFORM, INC.,	)	
Defendant.	)	

AMENDED JUDGMENT

This action came on for trial before the Court and Jury, the Honorable H. Dale Cook, District Judge, presiding, the issues having been duly tried and the Jury having duly rendered its verdicts as follows: For the plaintiff Bobby Jo Harrison and against the defendant Lion Uniform, Inc., and fixing his damages in the amount of $57,506.00; and further finding for the plaintiff Regina Harrison and fixing her damages in the amount of $0.00.

Pursuant to such jury verdicts, and pursuant to the filed stipulation between all of the parties and further stipulation by and between all of the parties at the time of trial, it is ordered and adjudged that the Third Party Plaintiff American Motorists Insurance Company recover of the defendent Lion Uniform, Inc., the sum of $34,230.00 with interest thereon as provided by law, and their costs of the action.

It is ordered and adjudged that the plaintiff Bobby Jo Harrison recover of the defendant Lion Uniform, Inc., the sum of $23,276.00 , with interest thereon as provided by law and his costs of the action.

It is ordered and adjudged that the plaintiff Regina Harrison recover of the defendant Lion Uniform, Inc., the sum of $0.00 and her costs of the action.

Dated this 8th day of March, 1979.

Judge of the United States
District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-572-C
GEORGE JEFFERSON PARKER, Defendant.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 8th day of March, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendant, George Jefferson Parker, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, George Jefferson Parker was served by publication as shown on Proof of Publication filed herein.

It appearing that the Defendant, George Jefferson Parker, has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twelve (12), Block Four (4), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, George Jefferson Parker, did, on the 27th day of January, 1977, execute and deliver to the Administrator of Veterans Affairs, his mortgage and mortgage note in the sum of $9,400.00 with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, George Jefferson Parker, made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of $9,559.39, as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from February 1, 1978, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, George Jefferson Parker, in rem, for the sum of $9,559.39 with interest thereon at the rate of 8 1/2 percent per annum from February 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, Defendant and all persons claiming under him since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

RDW/sr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIRST NATIONAL BANK OF FORT SMITH, Plaintiff,	)	FILED
vs.	)	No. 78-C-30-B MAR 7 1979
ST. PAUL INSURANCE COMPANY and GULF INSURANCE COMPANY, Defendants.	)	Jack C. Silver, Clerk U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON this 7th day of March, 1979, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendants be and the same hereby is dismissed with prejudice to any future action.

W. Dale Cook
JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

DALE WARNER

Attorney for the Plaintiff

KNIGHT, WAGNER, STUART & WILKERSON
RICHARD D. WAGNER

Attorney for the Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 7 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States of America, Plaintiff, vs. 92.05 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, and John Roberson, et al., and Unknown Owners, Defendants.	CIVIL ACTION NO. 76-C-578 Master File No. 398-6 Tracts Nos. 311 and 311E

JUDGMENT

1.

Now, on this 7th day of March, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estates condemned in Tracts Nos. 311 and 311E, as such estates and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on November 19, 1976,

the United States of America filed its Declaration of Taking of such described property, and title to the described estates in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of certain estates in subject tracts a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject tracts and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estates condemned in subject tracts is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estates taken in subject tracts and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED, and DECREED that the United States of AMerica has the right, power and authority to condemn for public use Tracts Nos. 311 and 311E, as such tracts are particularly described in the Complaint filed herein; and such

tracts, to the extent of the estates described in such Complaint, are condemned, and title thereto is vested in the United States of America, as of November 19, 1976, and all defendants herein and all other persons interested in such estates are forever barred from asserting any claim to such estates.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estates condemned herein in subject tracts were the defendants whose names appear below in paragraph 12, and the right to receive the just compensation for the estates taken herein in such tracts is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As to Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estates condemned in subject tracts as follows:

TRACTS NOS. 311 and 311E

Owners:

John Roberson and Yvonne Roberson

Award of Just Compensation pursuant to Stipulation -------	$62,500.00	$62,500.00
Deposited as estimated compensation ----------	53,250.00	
Disbursed to owners ----------		53,250.00
Balance due to owners ----------		$ 9,250.00
Deposit deficiency ----------	$ 9,250.00	

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tracts, the deposit deficiency in the sum of $9,250.00 and the Clerk of the

Court then shall disburse the deposit for such tracts as follows:

To:

John Roberson and
Yvonne Roberson, jointly ---------- $9,250.00.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY M. BLEVINS, Plaintiff, vs. BRUCE NESCHER, d/b/a SLEEK CRAFT BOATS and d/b/a BOATS BY NESCHER, and MURRAY MARINE, INC., A Texas corporation, Defendants.	)	No. 78-C-504-C

O R D E R

The above-captioned case is brought by the plaintiff under the theory of Manufacturers' Products Liability. The defendants are the manufacturer/distributor and retailer of a pleasure boat owned by the plaintiff. Defendant Murray Marine, Inc., the retailer, now moves the Court to dismiss plaintiff's claim against it.

Defendant contends that the Court lacks in personam jurisdiction over it because it does not regularly do or solicit business in the State of Oklahoma, nor does it derive substantial revenue from goods used or consumed in the State of Oklahoma, as is required by the Oklahoma "long-arm statute", 12 O.S. § 1701.03. Defendant has submitted an affidavit to that effect.

The plaintiff contends that recent case-law from the Oklahoma Supreme Court establishes this Court's jurisdiction over the person of defendant under Section 1701.03. That statute provides in pertinent part as follows:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
>
> (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or

> engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;"

In World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978), the court held that the trial judge was authorized to exercise in personam jurisdiction over the nonresident distributor and retailer of an automobile in a products liability action.

> "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State." 585 P.2d at p.354.

In Oklahoma, jurisdiction over nonresident defendants cannot be inferred, but must affirmatively appear from the record. See Roberts v. Jack Richards Aircraft Co., 536 P.2d 353 (Okla. 1975); Crescent Corp. v. Martin, 443 P.2d 111 (Okla. 1968). When a jurisdictional question arises, the burden of proof is upon the party asserting that jurisdiction exists. See Roberts v. Jack Richards Aircraft Co., supra.

The only proof that plaintiff offers on the jurisdictional issue is his affidavit. He merely states therein that he purchased the boat from the defendant in Ft. Worth, Texas for $6,500.00, brought the boat to his home in Miami, Oklahoma, and that the accident set forth in his Complaint occurred while he was using the boat on Grand Lake O' the Cherokees in Delaware County, Oklahoma.

This is not sufficient proof of the Court's in personam

jurisdiction under the holding in World-Wide Volkswagen, supra. The plaintiff has offered no evidence that "goods sold and distributed by [the defendant] were used in the State of Oklahoma", except for his own purchase of defendant's goods. The Court cannot infer that the defendant sold other boats that were used in this State.

Plaintiff also refers the Court to the case of Winston Industries, Inc. v. District Court, 560 P.2d 572 (Okla. 1977). In that case the Court declined to apply the "minimum contacts" test in determining whether the trial court had in personam jurisdiction over the manufacturer of an allegedly defective product. The test adopted by the Court was as follows:

> "'Where it is reasonably foreseeable that a product will enter the flow of commerce, the manufacturers of that product can expect to be sued in any state where the product is alleged to have caused an injury. This is without regard to how many hands have touched the product from its production to the time or place of the injury. Whether it be labeled a minimal contact within the forum state if the litigation concerns a commercial transaction, or a one act tort, the effect is the same, i.e., jurisdiction in the forum state attaches. . . .' (Emphasis ours)" 560 P.2d at p.574, citing Metal-Matic, Inc. v. District Court, 82 Nev. 263, 415 P.2d 617 (1966).

The court in Winston noted that the rationale of Gray v. American Radiator Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) ruled the Metal-Matic case, supra. In World-Wide Volkswagen, the court specifically rejected the Gray holding. 585 P.2d at pp.353-4. The Court must therefore assume either that the World-Wide Volkswagen decision overrules the earlier decision in Winston, or that the Winston holding does not apply to retailers or distributors of defective products. In either event, the Winston holding would not be applicable to the case at bar.

For the foregoing reasons, it is therefore ordered that the Motion to Dismiss of the defendant Murray Marine, Inc.,

is hereby sustained.

It is so Ordered this 7th day of March, 1979.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CARROLL B. CORLEY, WILLYE L. CORLEY, HOMEMAKERS FINANCE SERVICE, INC. d/b/a G.E.C.C. FINANCIAL SERVICES, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 78-C-582-C

FILED

MAR 7 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 6th day of March, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, appearing by its attorney, Deryl L. Gotcher, Jr., Assistant District Attorney; and the Defendants, Carroll B. Corley, Willye L. Corley and Homemakers Finance Service, Inc., d/b/a, G.E.C.C. Financial Services, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Carroll B. Corley and Willye L. Corley were served with Summons and Complaint on December 28, 1978; County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma were served with Summons and Complaint on December 4, 1978; and Homemakers Finance Service, Inc., d/b/a, G.E.C.C. Financial Services was served with Summons and Complaint on December 5, 1978, as appears from the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma have duly filed its Answers herein on December 20, 1978; and that the Defendants, Carroll B. Corley, Willye L. Corley and Homemakers Finance Service, Inc., d/b/a, G.E.C.C. Financial Services, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Two (2), Block Fifty-seven (57), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

THAT the Defendants, Carroll B. Corley and Willye L. Corley, did, on the 16th day of November, 1972, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $11,250.00, with 7 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Carroll B. Corley and Willye L. Corley, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $10,404.42, as unpaid principal with interest thereon at the rate of 7 1/2 percent per annum from June 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Carroll B. Corley and Willye L. Corley, the sum of $_____ plus interest according to law for real estate taxes for the year(s) 1978 and that Tulsa County should have judgment, in rem, for said amount, and that such judgment is superior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Carroll B. Corley and Willye L. Corley, in personam, for the sum of $10,404.42, with interest thereon at the rate of 7 1/2 percent per annum from June 1, 1978, plus the cost of this action accrued

and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Carroll B. Corley and Willye L. Corley, for the sum of $ 0 as of the date of this judgment plus interest thereafter according to law for real estate taxes, and that such judgment is superior to the first mortgage lien.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendant, Homemaker Finance Service, Inc., d/b/a, G.E.C.C. Financial Services.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment which sale shall be subject to the tax judgment of Tulsa County, supra. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and be virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE,
Assistant United States Attorney

Deryl L. Gotcher, Jr.

Deryl L. Gotcher, Jr.
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BARRETT LANE SPENCER, Plaintiff, vs. THE AETNA CASUALTY AND SURETY COMPANY, a Foreign Insurance Corporation, and ALLEN SHUMATE HORNER, INC., an Arkansas Corporation, Defendants.	)	NO. 79 C 23 C

FILED

MAR 7 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 6th day of March, 1979, the Court having considered plaintiff's Application For Order Of Dismissal With Prejudice finds that good cause exists to support the issuance of such an order.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause of action be and is hereby dismissed with prejudice.

/S/ H. Dale Cook
United States District Judge

MPA:dk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD L. LUNDY, Plaintiff,	)	
vs.	)	No. 78-C-524-B
JOSEPH TUDOR ROBBINS; HERTZ RENT-A-CAR, a Foreign Corporation; and CROUSE-HINDS, INC., a Foreign Corporation, Defendants.	)	

O R D E R

The Court has for consideration the Motion to Dismiss of Defendant Hertz Rent-A-Car and has carefully reviewed the entire file, the briefs, the cited authorities and the recommendations concerning said Motion, and being fully advised in the premises, finds that the Motion to Dismiss of Defendant Hertz Rent-A-Car should be sustained for the reasons stated herein.

Plaintiff states that the Defendants were guilty of negligence in that Mr. Robbins failed to avoid striking the Plaintiff's car and that since he was acting within the scope of his employment, his employer, Crouse-Hinds, Inc., is also liable. Plaintiff only asserts that Hertz Rent-A-Car leased the car to Mr. Robbins. No negligence on the part of the Defendant, Hertz Rent-A-Car, was alleged in the Petition. The mere existence of the contractual relationship without further facts is insufficient to make Hertz liable. Plaintiff, therefore, has not stated a cause of action for which relief can be granted against the Defendant, Hertz Rent-A-Car.

IT IS THEREFORE ORDERED that the Motion to Dismiss of the Defendant, Hertz Rent-A-Car, be and the same is hereby sustained.

DATED this 6th day of ~~February~~ March, 1979.

s/W. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAZEL IRENE LUNDY,

Plaintiff,

vs.

JOSEPH TUDOR ROBBINS; HERTZ RENT-A-CAR, a Foreign Corporation; and CROUSE-HINDS, INC., a Foreign Corporation,

Defendants.

No. 78-C-525-B

O R D E R

The Court has for consideration the Motion to Dismiss of Defendant Hertz Rent-A-Car and has carefully reviewed the entire file, the briefs, the cited authorities and the recommendations concerning said Motion, and being fully advised in the premises, finds that the Motion to Dismiss of Defendant Hertz Rent-A-Car should be sustained for the reasons stated herein.

Plaintiff alleges in this action that the Defendant, Joseph Tudor Robbins, was negligent in failing to avoid striking her car in an automobile accident, which occurred on September 10, 1976, and that since Mr. Robbins was acting within the scope of his employment, his employer, Crouse-Hinds, Inc., is also liable. Plaintiff additionally asserts that Hertz Rent-A-Car was guilty of negligence in that it failed to ascertain the propensity of the negligent driving habits of the lessee, Mr. Robbins, and was additionally negligent in leasing the car to him.

The Defendant argues that Plaintiff has not stated sufficient facts to constitute a cause of action in the State of Oklahoma. In the case of Barger v. Marger, 424 P.2d 41 (1967 Okla.), the Court stated the following:

"To hold defendant liable for entrusting the vehicle to a careless, reckless or negligent driver, it was necessary to show defendant had knowledge Lang was incompetent, careless or reckless, or that in the exercise of ordinary care defendant should have known this by reason of the facts and circumstances."

In order for Hertz Rent-A-Car to be liable under a negligent entrustment action, it must be alleged that Hertz should have known or did in fact know that their lessee was an incompetent, unlicensed, intoxicated or irresponsible driver. There is nothing in the allegations that indicate Hertz should have known such or in fact did know such. As to the second allegation of negligence, it is well known that leasing companies have no control over the lessees once the vehicle is out of the lessor's possession. The allegation that Hertz was negligent merely because Mr. Robbins had an accident is unfounded in law. Mere ownership does not impute liability without some further contractual connection or an imposition by law.

IT IS THEREFORE ORDERED that the Motion to Dismiss of Defendant Hertz Rent-A-Car be and the same is hereby sustained.

DATED this 6th day of ~~February~~ March, 1979.

W. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY JO HARRISON and REGINA HARRISON, husband and wife,	)	
Plaintiffs,	)	
vs.	)	No. 77-C-181-C
LION UNIFORM, INC.,	)	
Defendant.	)	

JUDGEMENT

This action came on for trial before the Court and Jury, the Honorable H. Dale Cook, District Judge, presiding, the issues having been duly tried and the Jury having duly rendered its verdict.

It is ordered and adjudged that the Plaintiff, Bobby Jo Harrison, recover of the Defendant, Lion Uniform, Inc., the sum of $57,506.00 with interest thereon as provided by law, and his costs of the action.

It is ordered and adjudged that the Plaintiff, Regina Harrison, recover of the Defendant, Lion Uniform, Inc., the sum of $0.00, and her costs of the action.

Dated this 6th of March, 1978.

H. Dale Cook
Judge of the United States
District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 6 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOE MACK,

PLAINTIFF,

vs.

AMERICAN MARINE & MACHINE COMPANY, a Foreign Corporation, and CHARLES HOUCK,

DEFENDANTS.

No. 79-C-70-C

ORDER

It is Ordered by the Court that Defendants' Motion For Change of Venue be Sustained.

Said cause is hereby transferred to the Western District of Oklahoma.

The Defendant is Ordered to Answer Plaintiff's Complaint within 30 days from this date.

DATED this 6th day of March, 1979.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a foreign corporation,

Plaintiff,

-vs-

WILLARD E. TURLEY; BARBARA F. McNATT, Administratrix of the Estate of Victoria G. Turley, Deceased; BARBARA F. McNATT; DORSEY GRAY; CHRISTOPHER STEVEN TURLEY, a minor and JAMES EDWARD TURLEY, a minor,

Defendants.

No. 78-C-425-C

FILED

MAR 6 19[illegible]

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The Defendant, Willard E. Turley, having failed to plead or otherwise defend in this action, his default having been entered by the clerk, and the Plaintiff and Defendants, Barbara F. McNatt, Administratrix of the Estate of Victoria G. Turley; Barbara F. McNatt; Dorsey Gray; Christopher Steven Turley, a minor and James Edward Turley, a minor, having made joint application upon affidavit to the Court for an order directing the entry of judgment by default; and it appearing to the Court that Gable, Gotwals, Rubin, Fox, Johnson & Baker have filed their attorneys' lien claim herein and are, therefore, entitled to a portion of said proceeds as their attorneys' fees, which portion is to be determined and approved by the District Court of Tulsa County, Oklahoma, the Court which appointed Barbara F. McNatt as Administratrix of the Estate of Victoria G. Turley, Deceased in case No. P-78-713;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant, Willard E. Turley, is not entitled to any of the $9,990.00 insurance proceeds deposited by Plaintiff with the Court Clerk of this Court, and has no right, interest or claim thereto;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court Clerk of this Court shall disburse $ 938.41 of the

$9,990.00 deposited herewith by Plaintiff to William S. Hall, attorney for Plaintiff, as Plaintiff's costs and attorney's fees;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court Clerk shall disburse the remaining $ 9,051.59 of the $9,990.00 deposited herewith by Plaintiff to the Court Clerk of Tulsa County, Oklahoma, in case No. P-78-713 to be distributed to Defendant, Barbara F. McNatt, as Administratrix of the Estate of Victoria G. Turley, Deceased, and her attorneys, Gable, Gotwals, Rubin, Fox, Johnson & Baker, as may be determined and approved by the District Court of Tulsa County, Oklahoma;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is discharged from all further liability to Defendants, Willard E. Turley, Barbara F. McNatt, Administratrix of the Estate of Victoria G. Turley, Deceased, Barbara F. McNatt, Individually, Dorsey Gray, Individually and as Guardian ad litem of Christopher Steven Turley and James Edward Turley, and Christopher Steven Turley and James Edward Turley, and each of said Defendants are hereby enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting the insurance contracts involved herein or claiming any of the proceeds thereof.

H. Dale Cook

JUDGE H. DALE COOK

APPROVAL AS TO FORM:

W. S. Hall

WILLIAM S. HALL
Attorney for Plaintiff

Richard B. Noulles

RICHARD B. NOULLES
Attorney for Defendants
BARBARA F. McNATT, Administratrix
of the Estate of Victoria G.
Turley, Deceased; BARBARA F.
McNATT; DORSEY GRAY; CHRISTOPHER
STEVEN TURLEY, a minor and
JAMES EDWARD TURLEY, a minor

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HESS OIL VIRGIN ISLANDS CORP., a United States Virgin Islands corporation; FEDERAL INSURANCE COMPANY, a New Jersey corporation; and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation,

Plaintiffs,

v.

UOP, INC., a Delaware corporation, WORD INDUSTRIES PIPE FABRICATING, INC., an Oklahoma corporation; and FISHER CONTROLS COMPANY, a subsidiary of Monsanto corporation, a Delaware corporation,

Defendants,

v.

THE LITWIN CORPORATION, a corporation,

Third Party Defendants.

v.

HESS OIL VIRGIN ISLANDS COPR., a United States Virgin Islands corporation; FEDERAL INSURANCE COMPANY, a New Jersey corporation; and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation.

NO. 75-C-383-C

ORDER

On Motion of Fisher Controls Company, and there being no objection thereto by the Third Party Defendant, the Third Party Complaint by Fisher Controls Company against the Litwin Corporation is dismissed by the Court, without prejudice.

Entered this 5th day of March, 1979

U. S. DISTRICT JUDGE

416

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

LARRY DEAN BOLES,

Bankrupt,

WARREN L. McCONNICO,

Plaintiff,

vs.

PAUL BLANKENSHIP, U-S ENAMELING SIGN CORPORATION, and TRI ANGLE DEVELOPMENT COMPANY,

Defendants.

FILED

MAR 3 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 78-C-446-B

ORDER

The parties having filed herein a Stipulation For Remand Pursuant To Rule 810, IT IS, THEREFORE, ORDERED that this action be remanded to the Bankruptcy Judge for the purpose of dismissal with prejudice in accordance with the Stipulation of the parties.

H. Dale Cook

JUDGE H. DALE COOK

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and GARY W. BENUZZI, Special Agent, Internal Revenue Service,	)	
Petitioners,	)	
vs.	)	No. 78-C-579-C
PHILLIPS PETROLEUM COMPANY, and MEL ADLER,	)	
Respondents.	)	

ORDER DISCHARGING INTERVENOR
AND DISMISSAL

On this 1st day of March, 1979, Petitioners' Motion to Discharge Intervenor and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Intervenor, William Don Bunch, be and is hereby discharged from any further proceedings herein and this action is hereby dismissed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and GARY W. BENUZZI, Special Agent, Internal Revenue Service, Petitioners,	)	
vs.	)	No. 78-C-580-C
SUNMARK INDUSTRIES and JERRY McALLISTER, Respondents.	)	

FILED
MAR 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING INTERVENOR
AND DISMISSAL

On this 1st day of March, 1979, Petitioners' Motion to Discharge Intervenor and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Intervenor, William Don Bunch, be and is hereby discharged from any further proceedings herein and this action is hereby dismissed.

Wesley E. Brett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

GLENDA L. HICKERSON,)
)
Plaintiff,)
)
vs.) No. 78-C-595-B
)
SEISMOGRAPH SERVICE CORPORATION,)
)
Defendant.)

FILED
MAR 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW on this 2nd day of ~~February~~ March, 1979, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above-styled and numbered cause by plaintiff and defendant. Based upon the representations and requests of the parties as set forth in the foregoing Stipulation, it is

ORDERED that plaintiff's Complaint and claims for relief and cause of action against the defendant Seismograph Service Corporation be and the same are hereby dismissed with prejudice.

H. Dale Cook
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:

HOWARD & RAPP

By R. K. Pezold
R. K. Pezold

Attorneys for the Plaintiff,
Glenda L. Hickerson

PRICHARD, NORMAN, REED & WOHLGEMUTH

By Joel I. Wohlgemuth
Joel I. Wohlgemuth

Attorneys for the Defendant,
Seismograph Service Corporation

L-5022

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

VON JURINE MALOY,

Plaintiff,

vs.

JAMES C. BURNETTE and LOREN ROSE,

Defendants.

NO. 78 C 262 B

STIPULATION OF DISMISSAL WITH PREJUDICE

COME now plaintiff and defendants and would show the Court that their differences have been compromised and settled and that nothing further remains to be done in this litigation and therefore moves this Court for an order of dismissal with prejudice.

Frank R. Hickman,
Plaintiff's Attorney

Joseph F. Glass,
Defendants' Attorney

FILED

MAR 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now in this 2ND day of ~~February~~ March, 1979, the Court having received an application for dismissal from the parties hereto, finds that their differences have been compromised and that this case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this case be and the same as hereby dismissed with prejudice.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

COLEMAN WHITE,)
)
Plaintiff,)
)
-VS-)
)
BILL WILSON, et al.,)
)
Defendants.)

No. 78-C-277-B

ORDER OF DISMISSAL

Pursuant to the stipulation of the parties filed herein, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and for good cause shown, this Court does hereby enter its order dismissing the above styled and captioned case with prejudice, and such dismissal shall act as a complete adjudication of all causes of complaint actions included within plaintiff's complaint.

ORDERED this 2nd day of March, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN D. BEELER a/k/a JOHN DEAN BEELER, SUSAN I. BEELER a/k/a SUSAN IRENE BEELER, EDDIE WILLIAMS, JR. a/k/a EDDIE WILLIAMS, WILMA WILLIAMS, BILL WHITE CHEVROLET COMPANY, an Oklahoma Corporation, MASONER'S, INC., CREDIT CONTROL SYSTEMS, INC., GEORGE PATRICK STACK, JR., GENEVA L. BEARD STACK, COUNTY TREASURER, Tulsa County, Oklahoma, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and TIM G. CARR, a single person, Defendants.	)	CIVIL ACTION NO. 78-C-329-B

FILED

MAR 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2ND day of ~~February~~ March, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendant, Eddie Williams, Jr. a/k/a Eddie Williams, appearing by his attorney, James H. Chafin; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appearing by its attorney, Andrew B. Allen, Assistant District Attorney; and, the Defendants, John D. Beeler a/k/a John Dean Beeler, Susan I. Beeler a/k/a Susan Irene Beeler, Wilma Williams, Bill White Chevrolet Company, an Oklahoma Corporation, Masoner's, Inc., Credit Control Systems, Inc., George Patrick Stack, Jr., Geneva L. Beard Stack, County Treasurer, Tulsa County, Oklahoma, and Tim G. Carr, a single person, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, John D. Beeler a/k/a John Dean Beeler, Susan I. Beeler a/k/a Susan Irene Beeler, George Patrick Stack, Jr., Geneva L. Beard Stack, and Tim G. Carr, a single person, were served by publication as shown on the Proof of Publication filed herein; and, that Defendants, Bill White

Chevrolet Company, an Oklahoma Corporation, Masoner's, Inc., County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, Oklahoma, were served with Summons and Complaint on July 18, 1978; that Defendant, Credit Control Systems, Inc., was served with Summons and Complaint on July 19, 1978; that Defendant, Eddie Williams, Jr. a/k/a Eddie Williams, was served with Summons and Complaint on August 16, 1978; and, that Defendant, Wilma Williams, was served with Summons and Complaint on August 24, 1978; all as appears on the United States Marshal's Service herein.

It appearing that the Defendant, Eddie Williams, Jr. a/k/a Eddie Williams, has duly filed his Answer herein on October 30, 1978; that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, has duly filed its Answer herein on August 4, 1978; and, that Defendants, John D. Beeler a/k/a John Dean Beeler, Susan I. Beeler a/k/a Susan Irene Beeler, Wilma Williams, Bill White Chevrolet Company, an Oklahoma Corporation, Masoner's, Inc., Credit Control Systems, Inc., George Patrick Stack, Jr., Geneva L. Beard Stack, County Treasurer, Tulsa County, Oklahoma, and Tim G. Carr, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Six (6), in Block Five (5), SUBURBAN HILLS ADDITION, to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, John D. Beeler and Susan I. Beeler, did, on the 20th day of September, 1974, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,000.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, John D. Beeler and Susan I. Beeler, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $8,797.46 as unpaid principal with interest thereon at the rate of 9 percent per annum from December 1, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that the Deed dated December 29, 1975, recorded in Book 4199, Page 2205, wherein George Patrick Stack, Jr. conveyed the property being foreclosed herein to George Patrick Stack, Jr. and Geneva L. Beard Stack is a Stray Deed and as such has no force in effect on the property being foreclosed herein.

The Court further finds that Eddie Williams, Jr. has never gone by the legal name of Eddie Williams; that Eddie Williams, Jr. is not one and the same person as Eddie Williams against whom certain judgment creditors have obtained judgments against; namely, Bill White Chevrolet Company, an Oklahoma Corporation, Credit Control Systems, Inc., and Masoner's, Inc.

The Court further finds that the Defendant, Eddie Williams, Jr., has a valid claim for one-half of the proceeds of any residue remaining after satisfaction of Plaintiff's Judgment herein by reason of a General Warranty Deed, dated April 25, 1975, filed June 18, 1975, in Book 4170, Page 62, with the records of Tulsa County, State of Oklahoma and further by way of a certain Divorce Decree entered in the records in the District Court in Tulsa County, State of Oklahoma, in the case of Wilma Williams vs. Eddie Williams, Jr., No. JFD 77-4186.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, John D. Beeler and Susan I. Beeler, in rem, for the sum of

$8,797.46 with interest thereon at the rate of 9 percent per annum from December 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plainitff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Deed dated December 29, 1975, recorded in Book 4199, Page 2205, wherein George Patrick Stack, Jr. conveyed the property being foreclosed herein to George Patrick Stack, Jr. and Geneva L. Beard Stack is a Stray Deed and as such has no force in effect on the property being foreclosed herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Eddie Williams, Jr. is not one and the same as Eddie Williams; and, that the judgment liens in favor of Bill White Chevrolet Company, an Oklahoma Corporation, Credit Control Systems, Inc., and Masoner's, Inc. are not judgment liens against this property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Eddie Williams, Jr., Wilma Williams, Bill White Chevrolet Company, an Oklahoma Corporation, Masoner's, Inc., Credit Control Systems, Inc., George Patrick Stack, Jr., Geneva L. Beard Stack, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, and Tim G. Carr, a single person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment.

The residue, if any, shall be deposited with the Clerk of the Court, one-half of such residue to be distributed to the Defendant, Eddie Williams, the remaining one-half of said residue to be held with the Clerk of the Court until further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

ANDREW B. ALLEN
Assistant District Attorney
Attorney for Defendants,
County Treasurer, Tulsa County
Board of County Commissioners,
Tulsa County

JAMES H. CHAFIN
Attorney for Defendant,
Eddie Williams, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and JOHN C. PRESTON, Revenue Officer, Internal Revenue Service, Petitioners,	)	
vs.	)	No. 79-C-16-C
LEE ROY G. ADAMS, Respondent.	)	

NOTICE OF VOLUNTARY DISMISSAL

COMES NOW the petitioners, United States of America and John C. Preston, Revenue Officer, Internal Revenue Service and, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, voluntarily dismiss this action, without prejudice and represent to the Court that respondent, Lee Roy G. Adams, has not been served, nor has he answered or otherwise plead in this matter.

HUBERT H. BRYANT
United States Attorney

Kenneth P. Snoke

KENNETH P. SNOKE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOMAS J. MUNSON and CONNIE MUNSON, Plaintiffs,	)	
v.	)	No. 77-C-156-B
BUDDY WEBB and M. C. PRUITT, Defendants.	)	

FILED
MAR 2 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

In accordance with the Order of the Court filed on ~~February~~ March 2, 1979, Judgment is hereby entered in favor of the plaintiffs, Thomas J. Munson and Connie Munson, against the defendant, Buddy Webb, in the sum of $4,250.00 together with a reasonable attorney fee in the sum of $3,750.00 and the costs of this action.

Dated this 2nd day of ~~February~~ March, 1979.

Wesley E. Brown

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Gene L. Hart, Plaintiff,	)	
vs.	)	No. 79-C-141-C
Sidney D. Wise, S. M. Fallis, Royce Hobbs, Ron Schaffer, and T. J. Graves; Prosecutors of Mayes County Oklahoma; William J. Whistler, District Judge; and the Honorable Tom Brett, Tom Cornish, and Hez Bussey; Judges of the Court of Criminal Appeals of the State of Oklahoma; R. L. Grimsley; Glen H. "Pete" Weaver, Defendants.	)	

O R D E R

The complaint and amendment thereto make general allegations that certain defendants have conspired to violate "the civil rights of the accused plaintiff." Further, that said violations were done under color of law and pretense of statute, regulation, customs and usage of the State of Oklahoma, and under the authority of their respective offices.

The complaint further alleges by conclusion that the federally protected rights cannot be eliminated by a trial on the charges which is set to begin on the 5th day of March, 1979.

The remainder of the complaint seeks relief from certain matters that clearly appear to be allegations of pretrial error, such as refusing to disclose investigative reports.

The immediate relief requested is that this court issue an ex parte temporary restraining order, apparently seeking such order to restrain the state trial from proceeding as scheduled until plaintiff can be heard.

It is apparent from a reading of the complaint and plaintiff's brief in support thereof that he seeks to restrain the state trial by reason of alleged procedural and constitutional error being committed in the state proceeding. Clearly each of such allegations can be raised before the state court as to the validity of any verdict or judgment entered therein. The judicial process is so constructed as to provide defendants in a criminal case full opportunity to raise and litigate these issues.

It is in the state action that these matters should be heard. As the plaintiff recognizes, it is well settled that a federal court should not enjoin a state criminal prosecution or any state judicial proceedings except for the most exigent reasons.

The matters presented to this court do not indicate irreparable injury.

For the foregoing reasons, the Court therefor denies plaintiff Gene L. Hart's request for an ex parte temporary restraining order.

It is so Ordered this 2nd day of March, 1979.

H. DALE COOK
United States District Judge